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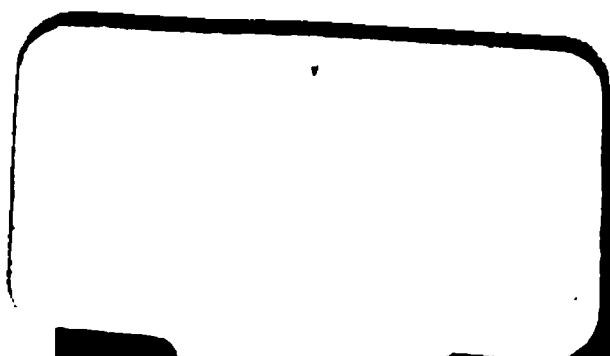
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Solicitor, Stirling*

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THE JOURNAL OF JURISPRUDENCE.

THE PRESENT SYSTEM OF CONDUCTING POORS' CAUSES IN THE COURT OF JUSTICIARY.

ABOUT forty-six years ago a statute was passed, under which a person accused of felony in England became, for the first time, entitled to employ counsel and attorney to conduct his defence. The state of the law prior to the Act 6 and 7 Will. IV. c. 114, by which this reform was introduced, was strangely anomalous. Prisoners who were charged with high treason had long enjoyed the right to avail themselves of professional assistance, while the same privilege was likewise accorded to those offenders at the opposite end of the scale, who are in England termed misdemeanants. It was to the intermediate class of criminals, from the petty thief up to the murderer, that the disability applied; in short, to the great majority of persons accused of serious crimes. For these unhappy beings no consideration was shown. Though it was then, as it still is, the merciful presumption of English law, that no accused person was to be deemed guilty until proved to be so, the practice was so inconsistent with the theory that, assuming a *prima facie* case for the prosecution, it was almost impossible for the prisoner to establish his innocence. He himself, however unsuited he might be for the task, was obliged to cross-examine the witnesses for the prosecution, to lead evidence in defence, and finally to address the jury on his own behalf. So inflexible was the rule that it yielded to no exceptions. The girl of eighteen indicted for child-murder; the aged man in failing health; the foreigner, ignorant of the language of the Court; the prisoner who pleaded temporary insanity at the date of the crime of which he was accused; nay, even the man who had been deaf and dumb from his birth,—all these the law held to be perfectly competent to conduct their own defence, and sufficiently well fitted to cope with the ingenious barrister who was fee'd for the prosecution. It is difficult

to conceive anything more monstrously untrue than such a theory, or anything more grossly unjust than the system which was derived from it. One feels loath to believe that so foul a blot, more characteristic of the tribunals of the middle ages, should have affected the administration of justice in England until far on into the nineteenth century.

The reform which was introduced into English law so recently as 1836, had been anticipated in Scotland by the enlightened jurists who flourished in that country towards the close of the sixteenth century. The Act of 1587, c. 91, contained the following express provision with regard to the defence of persons accused of crimes: "That all and whatsumever lieges of this realme accused of treason, or for quhatsumever crime, sall have their advocates and procuratoures to use all the lauchful defences quhom the judge sall compel to procure for them, in case of their refusal; that the sute of the accuser be not tane *pro confesso*, and the party accused prejudged in ony sute before he be convicted be lauchful trial." From this Act has been derived the present system of providing poors' agents and counsel who should undertake the duties, which in terms of the Act could be imposed by the presiding judge upon any agent or counsel.¹ These procurators for the poor are, generally speaking, selected from the last intrants of the various faculties of lawyers, each member of which may be made to serve in rotation for not more than a year. In the Faculty of Advocates so large has been the number of intrants within recent years that at present advocates of three years' standing are being selected to fill the six vacancies which annually occur in the roll of poors' counsel; but this does not apply to the Circuit Courts of Justiciary, where only young advocates of less than three years' standing are allowed by professional etiquette to appear and plead in unfee'd causes.

But while Scotland has been for nearly three centuries free from the reproach which until comparatively recent times attached to the trial of prisoners in England, and made such trial in many cases no better than a mockery, it does not seem to have occurred to Scottish lawyers that exactly the same arguments which induced the Legislature to pass the Act of 6 and 7 Will. IV. apply with almost equal force to our *present* system of trying poor prisoners in the Court of Justiciary. It is true that no accused need be without the services of an agent and an advocate, nor does it often happen that they reject professional assistance. But what the value of such assistance is may be gathered from the following sketch of the manner in which poors' causes are conducted in the principal Circuit Court of Scotland, with which the writer is best acquainted.

The judges and advocates generally arrive simultaneously at their hotel in Glasgow about ten o'clock in the morning. The judges' levee is held about half-past ten, and the Court sits at

¹ *Vide* Acts of Sederunt of 1842 and 1877, which contain the existing regulations.

eleven. While the advocates are assembling for the levee, the poors' agents *begin* to distribute amongst them the cases which are set down for trial. These embrace all the serious offences which have been committed in the district, and include charges of murder, rape, robbery, and fire-raising, which cannot be tried in the inferior Courts; the remainder being cases of theft, assault, forgery, etc., in which the prosecutor desires a heavier sentence than the Sheriff is competent to inflict. The importance, therefore, to the accused of their having a fair trial in this Court, the proceedings in which are final, can scarcely be overrated. Upon the issue of the trial depends in some cases the very life of the prisoner; while in all cases a conviction may involve a sentence of five years or more of penal servitude.

The cases, which number from thirty-five to seventy, having been distributed, the judges appear at the levee, and immediately after proceed to the Court House, where juries are at once impannelled and the trials proceeded with. Those advocates who have to appear in the first cases have by this time scarcely been able to read through the indictments against their clients, and have barely made themselves acquainted with the nature of the charge before they are called upon to state objections to the relevancy, or to cross-examine the first witness for the Crown. Need it be wondered at that objections, even when statable, are in these circumstances omitted, or that mistakes are made which would be ludicrous but for the gravity of the prisoner's situation? Cross-examination by the counsel for the defence becomes a hopeless task. With no materials upon which to proceed; without experience to guide him in his line of examination; bullied by the judge, who wearies of his pointless inquiries; and laughed at by the jury each time his questions elicit a damaging reply; the unfortunate young man flounders through a few commonplace questions, and finally collapses into his seat with the comfortable consciousness that he has irretrievably destroyed every hope of an acquittal.

This may be thought an extreme case, and doubtless in one respect, viz. as to the time possible for preparation by counsel, the cases which are subsequently called are in a somewhat better position. But even if he has time to study his indictment, that can be of little avail in the complete absence of other instructions. In the majority of cases the indictment and the prisoner's declaration, with perhaps one or two verbal explanations by the agent, are the sole information afforded to the counsel for the poor; and on this scanty foundation, enlarged by theories which he has no means of testing, and which generally turn out to be false, he has to build up his defence. Even the precognitions of the Crown witnesses are to him inaccessible; for it is a rare instance of generosity, and only conceded in highly important charges, when the Advocate-Depute allows his opponent to read the statements on the truth of which the proof of the prisoner's guilt depends. No doubt the

witnesses are at hand, and may be personally precognosced by counsel; but any one who has tried, amongst the hundreds of unsavoury witnesses who throng the back-rooms and lobbies of the Court, to find the batch applicable to a particular case, will not care to repeat the attempt oftener than he can help. Besides, precognition is no part of the duties of counsel, and in the bustle and hurry of a Circuit Court it is often impossible to obtain the time necessary for instituting personal inquiries. As for any evidence for the defence, however important such might be, and however much it may be suspected to exist, that is entirely out of the question. Where any evidence at all is led for the prisoner, it generally consists of the statements of his relatives, whose partiality renders them peculiarly unfit to act the part of witnesses, and who on being sworn are too often warned by the judge of the serious penalties of perjury in a tone so cruelly suggestive that it deprives their testimony of what little weight it might otherwise have had with the jury.

In the circumstances just mentioned it can be no matter for surprise that convictions at Glasgow, where intelligent jurymen are generally to be had, follow in almost unbroken succession; the wonder is that any prisoner who cannot pay for his defence is ever acquitted. A civil claim would be baseless indeed which could not be established by proof, provided there were no defence, or only such a defence as could be offered by a counsel instructed on the morning of the trial, and incapacitated from leading any evidence on his client's behalf. Yet this is a case precisely parallel to what happens in almost all the criminal charges which are tried on Circuit—cases where the stake is not a mere pecuniary consideration, but the life or liberty of the person accused. Can it be said that under this system the prisoner receives a fair trial? On the one side is ranged the Advocate-Depute, a man probably of large experience in his profession, with a complete set of selected precognitions in his hand, and with judge and jury biassed in his favour; on the other side the newly-fledged advocate, ignorant of all but the nature of the charge, and without the means of leading exculpatory evidence. In too many cases such is the disparity of the opposing forces that the trial becomes little better than a sham, the only real part of which is the sentence that follows on conviction.

The foregoing remarks are applicable to the bulk of the criminal causes which are tried on Circuit—to all those obscure crimes which receive only a passing notice in the local newspapers and awaken no sort of public interest. They do not, however, apply to sensational crimes—crimes of such a peculiar cast, or of such aggravated wickedness, as to rouse the curiosity and fix the attention of the public. The defence of a person accused of a crime of this description, however impecunious he may be, is generally conducted with sufficient skill. To be concerned in the defence of such a criminal is an advertisement which stimulates both agent and counsel to extraordinary efforts; considerable outlay is cheerfully borne by the

former, while the latter devotes his best energies to the preparation of an ingenious case. Under the present system of conducting poors' causes on Circuit, we have thus the anomaly that the blacker the crime, the more painstaking and skilful will be the defence of the criminal. Perhaps under any system it would be impossible to remove this anomaly entirely, but it certainly need never be the case, as it is at present, that the *only* criminals who receive anything like a full and fair trial are those whose offences are sufficiently abnormal to merit large-type headings in the daily newspapers.

It may be said that the defects which I have endeavoured to point out in the present mode of trying prisoners in the Circuit Courts are not defects of the system, but are due to the perfunctory manner in which those persons to whose care the interests of the poor are intrusted discharge their duties. But a moment's consideration will show that it is not so. The poors' agent may be bound to give his services in the defence of his client, but he is under no obligation to expend money of his own in what is truly a public object. And yet without such expenditure he can scarcely advance a step. In order even to obtain the precognitions of the Crown witnesses, he would often require to travel long distances, and absent himself for considerable intervals of time from his office, to the great detriment of his own business. But, in truth, the labour of obtaining precognitions in the cases which are handed over to his care could not possibly be undertaken without remuneration by any writer who had anything at all to do. I have just looked through a bundle of indictments, and I find that the average number of witnesses in each is about twenty. When it is considered that a poors' agent may have from ten to twenty cases at a single Circuit, some estimate may be formed of the enormous burden which would be thrown upon him were he obliged at his own expense to precognosce the witnesses in each case, resident, as they would certainly be, in widely separated quarters of the city, and even in the surrounding country districts. To throw such a burden upon any man without adequate remuneration would be a tyranny which would prove as useless as it would be intolerable; and yet without something of the kind being done, no poor prisoner can possess, what every Scotsman desires that he should have, viz. the power of making "a full answer and defence" by counsel to the charge upon which he is imprisoned.

A great deal of the injustice above pointed at could be obviated by the adoption from the English law of a very simple provision in the statute of William IV. previously referred to. Sections 2 and 3 of that statute provide that the prisoner shall at any time be entitled to see and read without fee the depositions of the persons on whose evidence he has been committed for trial; and also to demand a copy of the whole depositions on paying a fee of not more than 1½d. per folio of ninety words.

Surely it would be an easy matter to introduce a corresponding provision into Scottish law, and to carry the concession a little farther by dispensing with the payment in poors' cases of any fee for one copy of the Crown precognitions. The prisoner should, moreover, be entitled to obtain the Crown precognitions a fortnight or so before his trial, so that time might be given his agent to prepare for his defence. A statute embodying this provision is, I think, urgently called for, and does not seem to be open to any valid objection.

But such a provision would not by itself secure a fair trial to poor prisoners, though it would go far to obviate the almost insuperable obstacles that are now interposed. It is obvious that the possession of the Crown precognitions would not render unnecessary a precognition by the prisoner's agent of the principal Crown witnesses, with a view to eliciting from them information that might support the case for the defence. Nor would it in any degree improve the prisoner's position with regard to his means of obtaining evidence on his own behalf. The expense of seeking out witnesses for the defence, and of their attendance, would still require to be borne by the prisoner's agent; and would effectually preclude all evidence of any value from being led. What, then, is the remedy? How can a fair trial be secured for the vast majority of persons accused of serious crimes in Scotland? There seems to be but one method by which this great object can be attained, and that is by protecting the poors' agent against outlay reasonably incurred in his client's behalf, and by allowing out of the public funds suitable remuneration to both agents and counsel for their exertions in the public interest.

On principle, at any rate, no valid objection can be taken to this proposal. It is undoubtedly the interest of the public, and one of the most important of public interests, that every man who is accused of a criminal offence should have a full and fair trial before he is convicted and punished. Is it too much to say that the public must pay for the attainment of this great public object? Is there not rather something contemptible in a system which cannot protect the rights of the subject without appealing to the pockets of the struggling law agent or the briefless barrister?

But it may be asked whether there is any instance of such a system existing in actual force at the present day, or whether the suggestions made are merely the outcome of the writer's imagination stimulated by a desire to benefit his own profession.

Certainly in England, though she is now in some respects in advance of the sister country in this matter of criminal trials, the counsel and attorney assigned to a poor prisoner are not paid, and the same rule, I believe, is followed in America. But in the little countries of Denmark and Norway the practice of feeing counsel for the defence in poors' cases has long prevailed—in the one case since 1793, and in the other since 1836; and our present Scottish

practice would doubtless be regarded by the Dane and Norwegian as a barbarous remnant of the jurisprudence of the middle ages. As we are accustomed to consider ourselves as the freest nation in the world, it may be of use, as tending to correct this error, to give an outline of the system of criminal prosecution which prevails on the other side of the North Sea, where the Teutonic love of independence, supposed to be especially characteristic of the English, has diffused itself more widely than amongst ourselves, and has breathed its own spirit into the dry forms of criminal procedure.

In Norway, as soon as a crime has been committed, it is the duty of the district magistrate to institute inquiries, and to order arrests. The preliminary investigation is taken by himself, and he may examine the suspected person as well as other witnesses in reference to the occurrence. When an arrest is made, the person arrested must be brought up for examination if possible within twenty-four hours of his arrest, failing which, he must be discharged. On the preliminary inquiry being completed, the proceedings are at once transmitted to a Crown official, who decides whether the Crown is to prosecute or not; and in the former event appoints a local solicitor to conduct the prosecution, and another to undertake the defence. Of course the prisoner may choose his own agent if he has the means of paying him.

Immediately after his appointment the prosecutor proceeds to take further precognitions, and this having been done, prepares and serves the indictment, along with a list of the witnesses he proposes to bring. He thereupon forwards to the prisoner's solicitor the indictment and list of witnesses, and the previous proceedings in the cause, together with a statement of the evidence he intends to lead, and a brief preliminary explanation of the case that is to be made against the prisoner. The prisoner's agent then institutes the further inquiries he considers necessary in his client's behalf and returns the process, together with a list of witnesses for the defence, stating at the same time the branch of the case on which their evidence bears. A diet of proof is then fixed by the magistrate, who after hearing the evidence (the taking of which he may adjourn at the instance of either party, should further investigation be deemed desirable) is bound to give his decision within three weeks. An appeal is competent at the instance of either party against his judgment.

For his trouble in the conduct of the case the prisoner's solicitor is well remunerated. His travelling expenses, hotel bills, etc., are paid by the Government, and he receives a fee in addition, which is high in comparison with the rate of remuneration in civil causes in Norway.

It would be difficult to conceive any fairer system of conducting the prosecution of persons accused of crimes than that of which a brief outline has just been given. The litigious method of arriving at the truth, which is generally acknowledged to be the best

possible, is here carried to its legitimate conclusion. The Crown and the prisoner are equally well represented. There is no disparity in the opposing forces. Neither can steal an unfair advantage over the other, for both are obliged to disclose beforehand the case they are respectively going to make; and each has the same power of obtaining evidence and ensuring the attendance of witnesses. But mark how the whole fabric falls, if you take away the element of remuneration. The moment the solicitor for the defence is informed that he will receive no remuneration for his trouble, that he will not even be reimbursed his outlay, his interest is to do nothing. It does not concern him more than any other member of the public whether an innocent man is convicted or not. No doubt, if he is a philanthropist, with plenty of time and means at his disposal, he may take an interest in some special case and endeavour to secure for it a vigorous defence. But the majority of poors' cases are not such as to justify philanthropic intervention; and yet it does not consist with the ends of justice even in the case of the blackest criminal, that anything short of complete legal proof should be sufficient to procure conviction. The counsel or agent may have a strong belief in his client's guilt, but it is nevertheless his duty to see, and it is the public interest that he should see, that that guilt is clearly proved, for the prisoner may be innocent in spite of appearances. But what right have the public to force this task upon any individual? Under what sanction can they call upon any man to sacrifice his time, his money, it may be even his convictions, for the sake of an object that concerns all alike? And if they have no right they have no power. It would be as wise to nominate unpaid policemen, and expect that the public peace would be preserved, as to demand that poors' agents should at their own cost secure the administration of public justice!

After all, the expense necessary to put matters on a satisfactory footing would be a mere trifle. The number of poors' cases that are annually disposed of in the Court of Justiciary, including pleas, can scarcely exceed 400. An allowance of five or six guineas overhead (the expenses to be in each case subjected to strict audit) would be amply sufficient to cover all necessary outlay and trouble both of agent and counsel; so that for a matter of £2000 per annum the pauper criminals of Scotland would be ensured a fair trial, and the public rendered reasonably secure against those miscarriages of justice, of which under the present system one occasionally hears, and which are certainly more numerous than is generally believed.

If this were an evil which affected any but the lowest stratum of society, it could not have existed so long as it has. Complaints would soon have found their way into the public press from individuals who had experienced the gross injustice of the present system, and would, I think, long since have been effectual to secure its abolition. But the unhappy race from whose ranks our prisons

are filled are a voiceless multitude. Ignorant and unlettered, they have no means of giving articulate utterance to the wrongs which they cannot but feel. The stolid apathetic face of the pauper prisoner who is on his trial before the Circuit judge unmistakably indicates that he regards the whole proceedings simply as a formal prelude to the inevitable sentence. And if there is any truth in what I have said in this paper, his opinion is not far wrong. In spite of the best efforts that counsel can make, in spite of the strictest impartiality on the part of the Bench, and the most humane disposition on the part of the public prosecutor, while our present system of conducting poors' causes in the Justiciary Court is adhered to, Scottish criminal jurisprudence will not be free from the reproach, which it has been the aim of centuries to eradicate, that it has one law for the rich and another for the poor. Is it not time that the last foundation upon which this reproach now rests should once and for all be swept away? and is it too much to hope that when attention is called to the disgraceful state of matters at present prevailing, the authorities will not be slow to devise a remedy?

FOURTEENTH REPORT OF THE JUDICIAL STATISTICS OF SCOTLAND FOR 1881.

CRIMINAL STATISTICS OF COUNTIES AND BURGHS.

(Continued from vol. xxvi. p. 646.)

THE last table we abridged gave the numbers committed for trial within the year, their offences, and the result of their trials. The retrospective table being the first under this section of "*Criminal Offences*," sets forth the results for five years, including 1881, and now a table is set apart for the same figures as were found in the retrospective quinquennial table applicable to 1881. It is headed "Sentences, Ages, and Sex," all which are found in the retrospective table. This humbly appears to us to be a very unnecessary task, involving much labour and cost. The only additional feature is that the table gives the *special* crimes or offences for which the culprits received sentence, but these not being given in the retrospective table afford no material for comparison with former years. The inutility of these tables may be seen at a glance. Many of the numerous columns to denote the sentences remain blank, or sometimes receive a single unit. Thus under the head of "Disposal of persons sentenced to death" two columns are set apart for "*execution*," one for males and another for females, but, fortunately for Scotland, both remain blank! Six columns are given for "commutation" of death sentences, and only one column has one person commuted to penal servitude for life. Five other sections with

ten columns are wholly blank! The fact might have been served by one line, to the effect that for murder one man had received sentence of death, but which was subsequently commuted to penal servitude for life. Another table is allotted for the "Courts of trial," and another for "aggravations," all which were given in the retrospective table, saving that the *particular* crime was not set forth, which was of no essential importance. Consequently many of the columns in these additional tables are left wholly blank! The tables proceed to allocate the previous general tables, with all their minutiae, amongst the 34 counties: (1) The "number of persons committed for trial," (2 and 3) "offences of persons disposed of," (4) "sentences," (5) "ages and sex," (6) "Courts of trial," (7) "aggravations," (8) "time between committal and disposal." Under the first section, of 2650 persons committed for trial the county of Lanark had 903; Edinburgh had 282; Renfrew, 186; Forfar, 168; and Argyle, 109; Banff, Kinross, and Peebles had each 7; Nairn had only 3; and Cromarty had none. Of 17 committed for "murder," Selkirkshire had the highest number, being 4, Lanarkshire 3, and Edinburgh none. The solitary sentence of death, afterwards commuted, appears under the head of Lanarkshire. Under the 5th section it appears there were only 7 children under the age of twelve convicted, of which Argyle claimed 1 boy, and Ayr 1 girl, Lanark 1, and Linlithgow 2 boys; Ross and Selkirk had each 1 boy convicted; Edinburgh had no juvenile offender convicted, which is a remarkable fact in favour of the industrial school system. Above sixty years of age there were convictions of 21 males and 11 females, Lanark taking 5 and Edinburgh 4 of the veteran criminals. Here again a variety of columns have not one figure to show their necessity; one especially, headed "free pardon," is wholly unoccupied by any receiving this act of grace. Under the 6th section of "Courts of trial" the Sheriff of Lanarkshire has 333 trials with juries, and only 169 without that aid. The Sheriff of Edinburgh had 140 trials with jury, and only 31 without juries. The Sheriff of Cromarty and Nairn had no trial either with or without jury for persons committed for trial. Of 90 persons tried before the High Court at Edinburgh, 53 were from that county and 17 from Lanarkshire, a few from other counties, and 19 of the counties had none tried in the High Court, but 317 tried in Circuit Courts, Lanarkshire having had 201 so tried. The 8th section is the most important, "showing the number of weeks elapsing between committal and disposal." But this is of less importance until the nature of each case can be particularized. The longest period has been 22 weeks, and is under the head of Dumfries. Eleven and 12 weeks are a very usual number between committal and disposal, but many are much less, and, on the whole, show a very favourable aspect of despatch in Scotland. In all these tables we do not find any trace of the numbers who took measures to force on their trial by "running their letters" under the Act 1701.

The portion of the tables given to "*Criminal Offences*," distinguished from police cases, is concluded with two important tables, being "Decennial comparison of the number of criminal offenders disposed of in Scotland for the *ten* years ended [ending?] in 1881." Under the head of "offenders against *the person*" there were the following numbers for the years:—

	1872.	1873.	1874.	1875.	1876.	1877.	1878.	1879.	1880.	1881.
For offences against the <i>person</i>	939	835	979	918	841	888	861	765	802	717
For offences against property, committed <i>with</i> violence	408	411	480	509	440	448	686	620	528	509
For offences against property <i>without</i> violence	1261	1234	1202	1168	1139	1097	1076	1031	947	948
For malicious offences against <i>property</i>	116	41	37	50	41	37	61	56	58	51
For <i>forgery</i> and offences against the <i>currency</i>	43	36	39	29	35	41	53	61	50	60
Other offences not included in the above classes	285	164	181	217	181	169	209	177	227	142
The grand total of criminal offenders disposed of in those years amounted to	3052	2721	2918	2891	2677	2680	2946	2710	2612	2427

Note.—All these sections are subdivided into the numerous particulars, as were given in previous tables.

The grand totals show a very considerable and gradual decrease of crime between the first and last years of the decade. This table affords an interesting index as to the increase or diminution of crime in the ten years specified, and the particular department of criminal offences in which such fluctuation occurred. Another table distributes the results of the ten years amongst the 34 counties, but does not specify the *particular* grades of crime as are given in the general table. Generally the counties show a gradual decrease of criminal offenders during the decennial period. Banff is conspicuous in having 37 criminals in the first year of the series and only 7 in the last year. Roxburgh is still more favourable, showing 269 in the first year of the decade, reduced to 15 in the last. Nairn had 13 at the commencement, and gradually reduced to 3. Cromarty had 2 in the first year and *none* in the last. Edinburgh had 341 in the first and reduced to 258 in the last. Lanark was nearly in the same condition from first to last, having in the first 805 and 843 in the last. Haddington, singularly enough, appears to have been stationary in this respect, having 24 in the first of the decade and 24 in the last! Orkney is in the same favourable condition, having the same number, 4, which number strangely occurs *five* times in the series.

The report proceeds, under "*Prisons and Prisoners*," with a "digest of returns collected under the Prisons (Scotland) Act, 1877, 40 and 41 Vict., c. 53, for the year ended 31st December 1881." This statistical report bears date 7th August 1882.

Immediately afterwards there was issued the report of the Prison Commissioners, dealing precisely with the same subjects. It may appear somewhat unnecessary to have the same statistics thus published in two separate official organs. This is the more remarkable that the collection of the *general* statistics, both criminal and civil, are devolved (somewhat singularly) on the Prison Commissioners. The two reports are not coincident in their dates, and thus unfortunately create some confusion and conflict.

Nothing is more remarkable than the history of prisons, or jails, as they were called in Scotland. Every royal burgh in Scotland was obliged to erect and maintain a jail, and also support its inmates. This was in return for certain privileges enjoyed by royal burghs. Even civil debtors became a burden on a burgh's funds, and the Act of Grace 1696 was designed to free them from this burden, and justly placed it upon the creditor exposing his unfortunate debtor to the *squalor carceris*. Not only had the burghs their jail, but every baron had his prison—a relic of the ancient pit and gallows. Hence so many castles and manors are still known under the initial syllable of Pit. Before the Prison Act of 1839 all baron jails or keeps required under the Jurisdiction Act, Geo. II. c. 43 (1748), to be licensed by the Sheriff, and it was essential to such licence that at *least one* window should be open to the street, so that there might be a slight guarantee that no great cruelty would be perpetrated on the unfortunate captive, who often received from a sympathizing Samaritan some creature comforts to mitigate the restraints on his liberty. People are still alive who remember of almsgiving through the windows of ancient burgh jails. This communication with the outward world must appear singularly repugnant to notions of modern prison discipline. When the Prison Act of 1839 came into operation, Mr. Frederic Hill, the Government Inspector, gave certain most amusing details of small prisons. The baron prison of the Duke of Athole at Dunkeld was in a dry, at least occasionally dry, arch of its celebrated bridge, which may still be seen, and where the inmates could listen to the soft murmur of the classic Tay. The baron jail of Lord Keith of Tulliallan, Kincardine-on-Forth, was in an old engine-house which once did service to a coal-pit then exhausted, and was far out in the sludge of the Forth, where the victims might listen to the roar of the wild waves. Many of these fastnesses were in the base of steeples—even the Pictish tower of Abernethy was thus utilized. It is often recorded that persons thus shut up amused themselves by mounting the belfry and annoying the peaceful inhabitants by chiming a midnight carol which Professor Oakeley would have pronounced only fit for a concert of demons. The Prison Act made great and just havoc of these numerous small and ill-regulated prisons. The policy has since been progressing in favour of large prisons, and to abolish those of lesser dimensions. The Prison Act vested the building

and maintenance of prisons both in counties and burghs in Prison Boards in each county. A *General Prison Board*, located in Edinburgh, had a general superintendence of all prisons, and the special management of the General Prison for Scotland at Perth. This large pile of buildings was, in the early years of this century, erected in great haste for the reception of French prisoners. It was but ill-suited for conversion, and had mostly to be remodelled. A subsequent Act (1877) vested the whole management of all prisons *nominally* in the Home Secretary, but *actually* in the Prison Commissioners. All that is left of Local Authorities is simply so many of a Visiting Committee, whose duty is merely to visit in rotation the prisons within their county each month. They have no voice in any appointment to office, or in any matter of management. At first the General Prison was designed for convicts for a season before being removed to the convict prisons in England. Subsequently male prisoners were at once sent there, and females alone retained. None were admitted for less than twelve months' detention. It was then reduced to nine months, then to six, and recently even to thirty days. The plan appears to be that each keeper of a prison reports weekly to the Commissioners its criminal population, showing how many cells are occupied and how many empty. The Commissioners then adjust the inmates by removal from one to another prison—sometimes remote from each other. This system may regulate the number of prisoners, and thus produce economy. But, on the other hand, it may be questioned whether these removals may not occasion considerable expense, render escapes not infrequent, as well as destroy the uniformity of discipline. Under the former practice each county had to erect and maintain its prisons and prisoners. Now they are free from local taxation, and the whole expense is defrayed from the Exchequer.

The first table under this division is a "comparative table of the *average daily* number of criminal and civil prisoners, both male and female, in the several prisons in Scotland, from the year 1840 to the year 1881 inclusive." This does not give much information. We print merely each decennial period. Thus the total averages in these years were—

		Criminal.	Civil.
1840	. . . . .	1940	108
1850	. . . . .	2990	69
1860	. . . . .	2101	64
1870	. . . . .	2742	88
1881	. . . . .	2642	24

A second table is a "comparative table of the *number* of criminal prisoners in Scotland from 1861 to 1881." This table embraces a host of figures, many of which have been already given in this *Journal*, vol. xxvi p. 644. It records under separate columns the ages of prisoners, their various punishments, imprisonments, transportation (abolished in 1861), penal servitude, whipping,

previous imprisonments, state of education of prisoners. This last statement is surely extended to a most scrupulous extent, viz. Number of prisoners on admission who could *not* read, read *with* difficulty, read *well*, could *not* write, could sign name *merely*, write with *difficulty*, write *well*, had learned *more* than *merely* reading and writing. It appears from this table that education has not yet descended to the criminal *strata*. In 1861 the non-readers numbered 3802, and in 1881 the *ignoti* had increased to 11,634. The non-writers in 1861 were 8371, and in 1881 they were increased to 17,595.

The third section records "Retrospective of finance, being comparative table of the expenditure for prisons in Scotland, and the average cost per prisoner from the years 1877 to 1881 inclusive." This must have cost much trouble and expense in collecting and tabulating. It sets forth under *thirteen* minute subdivisions the several items of expenditure both in the General Prison at Perth and the county prisons. Several of these subdivisions are ridiculously minute, such as "*soap and scouring, etc.*," "*medicines*," "*gratuities*." This last is rather vague, amounting, as it does, between the General Prison and county prisons, nearly uniformly to the sum of £800—the lion's share being appropriated to the General Prison. We may feel surprised to find a charge stated for "*rent, rates, and taxes*" on prisons, both General and counties. The total quinquennial yearly average of expenditure on prisons in Scotland amounts to £67,628, the General Prison costing £18,550 of that sum. The "*average annual cost per prisoner and annual cost per prisoner*" is next given, with a "*quinquennial yearly average ending in 1881*." This shows the annual expense of each prisoner in the General Prison to have been £25, and in the county prisons £22. A section is headed "Labour Department," showing "*receipts for work sold*," "*expenditure for materials, etc.*," and "*balance, being net profit*," showing on the "*quinquennial yearly average ending in 1881*" of profits derived from labour £4742 in county prisons, and £2831 from the General Prison, or net annual cost per prisoner on the same quinquennial average of £20 in the county prisons, and £21 in the General Prison, after deducting profits of labour. A table is given detailing the funds administered by the "Department of Prisons and Judicial Statistics for five years ending 31st December 1881." A list of the 34 county prisons still existing in Scotland is given, with "eight police cells legalized under the Summary Procedure Act, 1864, for periods not exceeding three days," and "*ten* police cells licensed by the Secretary of State in terms of sec. 8, Prisons (Scotland) Act, 1877, for periods not exceeding fourteen days."

A table sets forth the average daily numbers of criminal and civil prisoners in confinement during the year 1881, the average daily number in the four quarters of the year—31st March, 30th June, 30th September, and 31st December—the number at the end of

the year, the *greatest* number of criminals respectively at any one time during the year, and "the average duration of each criminal prisoner." The most morbid statist must surely be amply satisfied with this plethora of figures. These tables are made applicable even to police cells licensed by the Secretary of State, although no civil prisoner is admitted, and no criminal but for a short period. We discover from these tables that the average daily number of prisoners during the year in confinement was 2629, of whom 700 were within the General Prison at Perth, and 675 in Glasgow Prison. Apparently not satisfied with the variety of phases in which the figures have been diversified, several tables are super-added showing the "*greatest* number and the *least* at any one time, including both sexes." Next, the criminal prisoners are classified into those in "separate confinement," "not in separate confinement, but under immediate and constant superintendence," "neither in separate confinement nor under immediate and constant superintendence"! This table closes with the ages of prisoners on admission. A table of previous imprisonments, with nine columns, shows that there were 78 males who had suffered upwards of *fifty* times imprisonment, whilst this was fearfully outnumbered with no less than *461* females who had graduated to the same unenviable degree! This is a mournful reflection on the softer sex. Then follows an extensive table of "disposal of prisoners." Thus, "Imprisonment for definite periods," "to penal servitude," "to death." This is again subdivided amongst the 36 jails and police cells in Scotland, and thus the greater number of the columns set apart for the reception of figures receive not a single unit from several jails! Still another table appears under a more singular description, "*Disposal of prisoners not sentenced.*" This, again, is subdivided into many very strange issues: "Not committed for trial," "proceedings dropped after commitment"! "taken into Court and not brought back"! "diet deserted *simpliciter*," "acquitted—otherwise disposed of,"? "in prison untried at the end of the year," "total not sentenced," "prisoners transferred and accounted for in other prisons, not including convicts sentenced to penal servitude;" "under sentence at commencement of the year." Another table records "whipping and hard labour" in all the prisons and police cells. Another table is devoted to "insane prisoners," and one for "Revenue prisoners" imprisoned until payment of fine or penalty, of which there were only 33 during the year for the whole of Scotland, one being a female. A table is set apart for "the *conduct* of prisoners," but only exemplified by "punishments for *misconduct* in prison," of which 2244 were inflicted on males and 407 on females. Then the ages of the prisoners who have incurred punishment. Next is a table recording the various punishments inflicted, such as "temporary deprivation of work," "changes in food," "light cells," "dark cells," "putting in irons," "other punishments"? Those who choose to look

at the figures will perceive that *changes* in food are chiefly the punishments had recourse to; but what may be the "*changes*" is left undiscovered. No less than 2723 males and 499 females suffered in the region of the stomach. The changes may be a luxury instead of the reverse. The cell punishment appears to be little in use—one prison (Kirkcudbright) used the "light cell" no less than 26 times, and 4 times the "dark" one. Next is the educational table, repeated under each jail, with the addition of "improvement during the year," "have improved in reading and writing, or both," "have improved in arithmetic or other branches of instruction" ? "have learned a trade in prison." Under this heading there appears in the General Prison to be 294 males and 63 females as having learned a trade in prison; 4 males in Aberdeen and 4 in Inverness are reported to have been equally qualified. But all the other prisons, Edinburgh and Glasgow not excepted, return a negative answer to this important interrogatory! Then follow tables of "health, and sickness, and death;" "the age of prisoners who have experienced sickness," "the character of disease and time of appearance," "the number of prisoners who have been off work, and how long." This report is more like one of a hospital than a prison. In all the prisons in Scotland, including police cells, there have been in all 3037 cases of sickness, of which 1887 were males and 1150 females, and 282 cases of "dangerous illness." "The cases of slight disorders" amounted to 2755. In 2479 cases the disease "appeared *before* imprisonment," and 558 *after* imprisonment. Another table gives "the time when prisoners have been off work from illness," which appears to be a repetition of a previous table under a slightly different phase. A table states "removals on account of *health*" (meaning sickness); 8 were "removed," but it is not said where to; and whereof 2 were "brought back;" 3 "died before *expiry of sentence*"—1 in the prison of Edinburgh, 1 in the prison of Dundee, and 1 in the prison of Wigtown, and none in the General Prison at Perth. There is a seeming contradiction in this, as in another column there appears no less than 30 deaths—of these, 9 in the Perth Prison. It is to be supposed that all died before "*expiry of sentence*." A table is allotted to *civil* prisoners. Not one is found in the column set apart for imprisonment for non-payment of "imperial taxes;" 14 were incarcerated for non-payment of "rates and taxes;" 1 for non-payment of fines and penalties "due to the Crown." For alimentary debts, 133 were imprisoned for "non-payment of aliment for illegitimate children;" 11 for aliment to wives; none for "aliment to parents;" 24 under *fugæ* warrants; 6 imprisoned under decrees *ad factum præstandum*; 1 male was imprisoned under "*lawburrows*;" and, as might well be supposed, no one was imprisoned as "*not included in the foregoing*," which included every possible ground of imprisonment; and this column, like many others, is consequently left empty. Eight male debtors "*consented* to work," and it is presumed did so; all the

remainder, amounting to 182, preferred to remain in idleness. A short table is given as to convicts sentenced to *transportation* and penal servitude in 1881, although there were none in that year under the former description. Thirteen prisons are specified, though only 3—Edinburgh, Glasgow, and the General Prison—had any under penal servitude. In the commencement of the year there were 221 held under “penal servitude” in Scottish prisons, reduced to 190 at the close of the year, the great proportion being within the walls of the General Prison. It is understood that recently the convicts are limited to *females*, the males being at once forwarded to the penal prisons in England. A brief table is given of the number of “escapes and recaptures.” The paucity of escapes is very satisfactory, there only being 1 male from Glasgow and 2 from Jedburgh. The last 2 were recaptured, but the 1 from Glasgow seems to have made good his escape. Two males escaped from the police cells at Montrose, and 1 male from Hawick, but all 3 were recaptured. Two males committed suicide—1 in Edinburgh and 1 in Glasgow—whose ages are recorded as at twenty and fifty-two.

NESTOR.

(To be continued.)

A SHADY CORNER.

OF the many daily frequenters of the Parliament House in Edinburgh, the seat of the Supreme Courts of Justice in Scotland, few have leisure to observe the less obtrusive visitors of the place. There is a permanent population there, of which every one takes note; and there is a shifting one, one in which there is change and variety, which escapes the observation of many. Litigants, no doubt, are continually changing (luckily for themselves); but they vary little. One litigant is much like another. They can all be assigned to a few stereotyped and uninteresting classes. There is rather more diversity among witnesses; but they also can generally be divided into one or two familiar groups, and are too common phenomena to be amusing. Then all the lawyers are pretty much alike—in two chief classes, distinguished in the one case by wigs and gowns, and in the other by shiny hats and any colour of tie that comes handy. The number of clerks, again, is limited by the demand, in a way in which the number of lawyers proper does not seem to be; and therefore there is even less variety among them than among their superiors.

Now, to the busy and preoccupied man, these, with a few well-known attendants, make up the Parliament House. But to the unemployed counsel—who is occupied for half the day in balancing himself on the fire-guard, and for the other half in sitting on a

bench and staring hard at the clock—to him, with his ample leisure, sightseers and others as they come about, supply an ever-changing subject for speculation and conjecture. He has time to observe the tourists as they enter the Hall with their amused faces, and to settle in his own mind the questions of their nationality and social position at home; time to note the Yankees in early summer, invading in bands of fifty or thereby, devoid of any false scruples in insisting on seeing everything; time to mark at all seasons the newly-married pair in humble life, who, visiting the metropolis for the first time, have recklessly plunged into the expense of a city guide for the day, and have of course been taken there as a part of the programme; time to scan the lady friends of his learned brothers, who come to see the mummy in the cellarage and the showily dressed gentlemen on the Bench. Every day too he can see illustrated in miniature the old story of all designs begun on earth below failing in the promised largeness, as one well-meaning visitor after another begins diligently to gaze at the first picture on the right, and thence gradually languishes in his interest, until the inspection is finally abandoned somewhere beneath the slender calves of “Duncano Forbes de Culloden.” From time to time also he sees the stray members of the public who make use of the library cross the Hall, straight as the crow flies, turning neither to the right nor to the left—strong-minded ladies, equipped with provisions for the day, and laden with manuscript; and stiff-haired gentlemen, very heavily shod.

But the really absorbing part of this shifting spectacle is to be seen almost any day of the year in the obscure corner of the Hall, near the law-room door. What could Dickens not have made of the scene presented here? What histories his imagination would have constructed for the mysterious, but suggestive, beings who daily take up positions in this gloomy corner! Its occupants are by no means numerous as a rule. Generally they range from three to half-a-dozen. Only in the colder weather, when snow and slush and frost make loafing outside cheerless and profitless work, does the number rise to a dozen.

In many respects this corner is in contrast with its surroundings. The Hall as a whole is fairly well lighted. This is *par excellence* the obscure corner; and to its prevailing gloom and kindly shadow it owes the character of its occupants. They are for the most part people whose complexions do not stand the strong light of the sun, and whose dismal minds it suits. Then, in the body of the Hall there is rush and bustle; nobody seems to care for anybody else, and every person is hurrying in a different direction from every other; and accompanying it all there is a good deal of noise. Far otherwise is it in the corner. Silence and repose have always the upper hand there. Its dingy denizens are outwardly impassive spectators of the bustle, as quiet and motionless as the surrounding busts. Although one or two chilly clerks sometimes gather there

in winter to warm themselves at the neighbouring fire, and discuss their respective employers with force and freedom the while, still this region seems to be tacitly set aside as the shady characters' corner. It has perhaps no single *habitué*, but it never lacks occupants for all that. Citizens of certain classes appear to have arranged to garrison this den by rotation. Here unemployed gentlemen of complex upbringing, sullen men with grievances, discharged heroes of sequestrations, seedy litigants, and dismal waifs of various types, congregate, to sit in the dark on the benches, or to surround the fire and raise from the damp relics of their wardrobes a general steaminess like the inside of a laundry. They have acquired a prescriptive right to the place; and they have similarly created servitude over the fire. No one tries to oust them from either.

A murky and silent corner it is. Its nondescript occupants seldom speak, and still more rarely do they move. When they do confide in each other, it is in an undertone as subdued as the light about them, or as their own broken fortunes. They are strange-looking beings most of them—such as glide silently past one on the street, too hurriedly to allow him to inspect them. But here he may do so with thoroughness. One might draw them at his leisure, they keep their attitudes so long and so placidly. One well-known figure on the benches aforesaid is that of a meagre, enduring lady with a bag, who has sat down to wait for a case, and has about her an air of determination that convinces one she will do it. She never ceases to open and shut her bag, but nobody ever sees her put anything in or take anything out. Stationed there when one came in the morning, she is still resolutely sitting there as the throng drops off gradually in the afternoon. So she will doggedly wait day after day until her case comes on, and then until it is decided; and, according as it is decided against her or in her favour, will she haunt the place all her life as one with a grievance, or resign her seat to another such. Alongside of her is often seen lounging a pale-faced man, with his arm supported by a red pocket-handkerchief sling. This corner, like the pews of the Second Division, is extensively used as a convalescent hospital and recreation-ground for sick artisans off work. They say that it is because the judges of that Court have such a cheery way with them, that doctors recommend it as a resort for those who require to have their spirits raised after illness. Many are the crutches and head-bandages one sees there on a winter morning. The other Division does not seem to have the same health-giving effect. Next to this invalid one probably sees the usual man with the usual patch on his eye and a three-and-a-half-days' stubble on his chin. He is a bankrupt; one who has been robbed, he will tell you, by the lawyers and his wife's brother or sister's husband. Yet he hangs about this place as if it had rather pleasant associations for him. He knows all the

lawyers' names, and can tell you the relative extent of their practices. When some case of public interest is going on, he is a useful man among the benches of the general public—his peculiar knowledge is in great demand then among the uninitiated who have dropped in to listen, and he imparts it with a surly pity for their ignorance. In the corner during wet weather there is generally to be seen the old profligate, who has assigned his umbrella in security for a loan, and has come in for friendly shelter—not an uncommon cause of population in this corner, by the way. He is a casual intruder, and is unversed in the catalogue of lawyers and in the intricacies of their procedure. But he does not acknowledge his ignorance, and has a dispute with the bankrupt as to which of the many wigged gentlemen is the Lord Advocate. He maintains that it is a fat little man in a worsted vest, an assertion which makes the soured old bankrupt very contemptuous indeed. Then there is generally, at least, one ticket-of-leave man who has come to the corner to eat his breakfast, and he does not hurry away when it is done.

But there is no use detailing more minutely the population of this romantic corner. Our object is merely to bring to the notice of any stray Dickens who may be abroad a field in which he might find material for his peculiar talents.

LIABILITY FOR ACTS OF ANIMALS.

A CASE has recently been decided in the Queen's Bench Division which has, we understand, been the theme of unusual discussion and difference in legal circles. The point was a quaint one, but does not seem to require great erudition for its solution. It has been, therefore, the more eligible as a topic of general discussion. It is very curious to observe how difficult cases sometimes are to solve which, at first sight, seem to depend on applications of the most elementary principles of justice to simple facts. In early times popular and picturesque titles were given to cases—as, for instance, the "Six Carpenters' case," and so this case may be known to future generations of lawyers as "The Ox in the Ironmonger's case." The facts were as simple as could be. An ox driven along a public highway through a town, without any negligence on the part of those driving him, insists on going into an ironmonger's shop, and before he can be got out does damage to the extent of twenty shillings. There seems to have been no evidence of any previous misconduct on the part of the ox, or that he bore a bad character as a turbulent or unruly ox, or one of an unduly or unreasonably inquisitive disposition. Who is to bear the loss, the owner of the ox or the ironmonger? The Court decided, reversing the decision of a county court, that the latter must bear the loss; but, from what we have heard, the conclusion that seems

to commend itself to most of the self-constituted judges of the case, at any rate at first sight, is that the ox-owner ought to indemnify the ironmonger. The Court refused leave to appeal, and in connection herewith may be noted an awkward conflict of expediciencies that frequently occurs with regard to these County Court appeals. We quite think, regarding the particular case alone, that the Court were right in refusing leave to appeal in a case where only a sum of twenty shillings was at stake; but, on the other hand, trifling cases may nevertheless form important precedents, and it seems to us that an important question of principle was involved. The judgment of most persons on first hearing of the case seems, so far as our observation goes, to be that the person who for his own benefit causes oxen or other animals to be driven along a highway ought to be responsible for damage done by them on adjacent private property; but this, like many other rough and ready views, on careful consideration, involves much more difficulty than those who propound it imagine.

It must be admitted that there are decisions of a highly technical character which, logically carried out, seem to afford great assistance to the view of the supporters of the ironmonger. It has been held (and on a previous occasion we have discussed the bearings of those decisions) that a man is liable in trespass for the acts of animals, his property or under his control, straying off his premises on to the soil of another. One most notable instance of this principle, carried to considerable length, is the case of *Ellis v. Loftus Iron Company* (L. R. 10 C. P. 10), where a horse of the defendants' injured another horse of the plaintiff's by biting and kicking it through the fence separating their land without any negligence on the defendants' part. It may be urged—and we think with some force—that if a man is liable for his animal's trespassing from his own premises, he must be equally liable for the animal's trespass on to private property from the highway. This case is not to be confounded with a case where the animal injures another's person or property on the highway without any default of its owner, for there it is clear that both parties use the highway subject to the risk of such contingencies.

But it may be said, What difference can the *locus a quo* the trespass of the animal took place make? the material point is the *locus in quem*, viz. on the private property of the plaintiff. We are not careful to discuss this point on purely technical grounds. The distinctions between trespass and case, and suchlike, may have had their advantages in bygone times, but they have likewise produced some confusion of thought by diverting men's minds from the substantial expediciencies on which all law really rests. The case of an animal trespassing from the highway on to private property is substantially different from that of animals trespassing from private property on to private property, the distinction between the two cases depending on considerations essentially connected with the use of the highway as such. It is obviously

just that, as between a man having no animals on his land and one having animals, the obligation to fence or take some other means so as to restrain the animals should rest on the latter. The former may say, I have no wish to keep animals, and if you choose to keep them you must restrain them from coming to eat my corn or grass. Though there is, of course, no obligation technically to fence, the practical question is, Who is to bear the consequence of absence of, or defect in, the fence which is practically the usual mode of keeping animals in? Regarding the decisions in this way, it is obvious that the question with regard to lands adjacent to a highway is substantially different. There is *prima facie* a public right to, and a public advantage in, the use of the highway by the public for the usual purposes of trade and traffic, and if the owner of adjacent land were allowed to leave the same unfenced, and entitled at the same time to make any person driving animals along the highway responsible for their straying on to such lands, the use of the highway would be restricted or rendered onerous by the sweeping liability thus imposed. Let us put a case by way of illustration which seems to us to be somewhat of a poser for the ironmonger's champions. Suppose a man chooses to leave a field full of tempting corn or grass unfenced from a highway, could it be for a moment suggested that it is just that he should have an action against every person whose ox or other animal, driven along the highway, strayed on such field and ate his corn or grass? We should say not, assuming, of course, that due diligence was used to drive the animal off speedily by his owner. There is not much direct authority on the point apparently, but there are *dicta*, especially some of Lord Bramwell's, which seem to bear out our contention in this respect, and on these we believe the Court to a great extent acted in the recent case. The principle must be, it would seem, that the landowner who does not choose to protect his land from the road, cannot impose a liability so burdensome to the usual and legitimate use of the highway on the owner of animals. But if this be so, is there any distinction with regard to the particular circumstances of a shop by the side of a town street as contrasted with a field of corn or grass by the side of a road? Can the landowner throw a greater or different burden on the person using the highway with reference to the particular use to which he puts his adjacent land?

Altogether, the question seems a very interesting and difficult one, and doubtless, in some future case, involving larger damages, the question whether recourse should be had on the subject to the Court of Appeal may engage the anxious consideration of some learned counsel properly stimulated in the usual manner, but at present we do not feel called upon to discuss it further. All we would remark is, that the Queen's Bench Division has at present decided it, and that there is, perhaps, more to be said for this decision than some who have beguiled leisure time in discussing it seem disposed to think.—*Solicitors' Journal*.

Reviews.

The Entail Amendment (Scotland) Act, 1882, with Notes and an Index to the whole Entail Statutes. By JOHN PHILP WOOD, W.S. Edinburgh: Bell & Bradfute. 1882.

THIS Act is a somewhat odd compromise. Looking to the importance attached by the present Government to the land question in all parts of the United Kingdom, a good deal more was expected. It is not clear why a good deal more might not safely have been asked. There is no stubborn resistance to further modifications of the law of entail than the present Act contains. The old land-owning class are not averse to an increase of the market value of their estates, even if it be at the expense of contingent interests. The *nouveaux riches* are anxious to buy for themselves, and the sentimental philanthropists wish the State to buy for behoof of small peasant proprietors. Even the opinion of conveyancers would not have stood in the way. The majority of legal bodies in Scotland were ready for the abolition of entail; and the "Settled Land Act, 1882," shows that in England, if they are not ready for the abolition of settlement, they would not have been satisfied by any equivalent for the meagre provisions of the Scottish Act.

The Act does not abolish entail, but it greatly facilitates the destruction of entail. It puts new entails almost in the same position as old entails with reference to the power of disentailing; or, as Mr. Wood puts it, it makes the 3rd section of the Rutherford Act apply to new entails. The only difference, therefore, which remains in the position of heirs wishing to disentail under new and old entails is that arising on the 1st and 2nd sections of the Rutherford Act. For the purpose of disentail without consent, or disentail with consent of heir-apparent alone, the age of both the disentailing and the consenting heir must be calculated in the one case from the date of the entailing deed, and in the other from the year 1848, which was apparently taken to include all entails existing at that date. Since 1st August 1869 it has been possible for a gradually increasing number of heirs of entail in possession under old entails to disentail without consent; and before long it must have become possible for every rich heir to do so. It is found in practice, however, that disentail proceedings are generally part of a negotiation for a re-entail, and therefore, while these privileges are gradually accruing to "old" heirs, a counter-process is going on which gradually converts "old" into "new" entails. In course of time, therefore, all entails will be new entails, the 3rd section of the Rutherford Act will become obsolete, and the whole law of disentail (unless further amended) will be contained in the 1st section of the Rutherford and the 3rd section of the present statute. In the case of entails made on the occasion of marriage,

or otherwise in favour of children *nascituri*, it would be impossible to extend the force of the entail beyond the majority of the first child entitled. This may at first sight seem to be no more than a reasonable liberty of settlement, but the probability is that the entail would be rendered practically perpetual by successive family agreements. The case of the heir in possession being the only heir in existence is one that occurs rarely, and where it does occur, the entail may not be destroyed within the period of minority, as the 11th section of the present statute does not apply to applications for disentail. It is hardly correct to say, as Mr. Wood does, that the creditors' proviso at the end of section 3 of the present Act is *in substance* a repetition of section 11 of the Rutherfurd Act. These two sections resemble each other in language, but the effect of the former is to make available to creditors the new disentailing powers created by the present Act. Nor can we altogether agree with Mr. Wood in his criticism of section 4 of the present statute when he says that its purpose is to "make it distinct" that the leasing, feuing, and charging powers are to be as extensive as the disentailing powers. Whatever the practice or the understanding of the profession may have been, it appears to us that definite legislation in the sense of section 4 was certainly required. The leasing, feuing, and charging powers given by the Rutherfurd Act were limited by the provisions of that Act defining the consents necessary in each case for disentail. It would have been an erroneous construction of that Act to say that A. B. was entitled to feu with the consent of C. D., because, if his entail had been "old" and not "new," he would have been entitled to disentail with the consent of C. D. If he was not entitled to disentail, he was not entitled to feu; and it is hardly necessary to point out that legislation in 1882 could not by implication alter the meaning of legislation in 1848. For purposes of legislation it is not conclusive that either the Court or the profession have adopted a certain construction of a statute. The business of Parliament is, through its responsible draughtsmen, to act on its own belief of the meaning of its own words, and "to mak siccar."

The procedure sections of the new statute are of considerable importance. The 5th section makes it competent to apply in the Sheriff Court for authority to borrow and charge for improvement expenditure and also for authority to grant leases. There had been a precedent for this in the case of applications for authority to feu in the Entail Amendment Act of 1868. Now, we do not wish to suggest that the Sheriffs are not perfectly qualified to decide such questions. Probably the only final solution of the jurisdiction question will be found in an unlimited local jurisdiction of the first instance, with one cheap appeal direct to the Central Court. But it is a foolish and irritating thing to deal with jurisdiction in small pieces. What, for instance, could be more irrational than that improvement expenditure petitions under the Entail Acts

of 1875 and 1878 should be competent in the Sheriff Court, but that improvement expenditure petitions under the Rutherford Act should not be so? There is no intelligible distinction between the two classes of petitions. In fact, section 6 of the present statute enlarges the amount to which improvement expenditure may be charged. This no doubt applies to all applications of the kind, but it enables the Sheriff to impose a heavier burden on the estate than the Supreme Court could do down to 1882. It would therefore seem as if the Legislature recognised the competency of the Sheriff Court for this class of business (as they did lately in the case of judicial factors), but thought at the same time that some miserable scraps must be reserved for the sustenance of the Court of Session. We have already referred to the section authorizing the intervention of guardians. It will effect a considerable saving in the administration of entailed estates that an authority once given by the Court to grant feus or long leases will now be available, not only during the lifetime of the petitioning heir, but also to his successors without fresh proceedings.

The 8th section of the Act has probably been suggested by the recent agricultural depression. Many deeds of entail prohibit leases at a diminution of existing rental, and in some cases it is believed that leases below a certain rate per acre or even a slump sum have been prohibited. Of course such clauses have recently been quite unworkable, and the Act accordingly in such cases permits a lease at a fair rent to be granted. The drift of all this reforming legislation is to put more confidence and responsibility in the heir in possession, to make him, in fact, the master of the situation, since no doubt he is best able to develop the estate, and most interested in doing so. It would be simpler to acknowledge him at once in theory as owner.

The 13th section introduces a new principle—that of compulsory valuation of the expectancy of the heir-apparent. This will be in many cases equivalent to a power to disentail without consent. It will be so in all cases where the heir in possession is in comparatively easy circumstances, and has no difficulty in raising the money to pay off the expectancies. The Act of 1875 introduced the compulsory valuation of the expectancies of the second and third heirs, but left the entail protected by the necessity for the consent of the heir-apparent. This has now disappeared, and with it has gone the argument for entails which was formerly founded on the importance of “the hereditary principle,” and of preserving “the continuity of ancient families.” If these sacred interests can now be bought on actuarial valuation, it is clear that sentimentalists need not any longer fear the final abolition of entails. The main principles of valuation have been stated in the cases of *De Virte* and *McDonald*, which establish that the expectancy, *not* the consent, is to be valued; but the cases under this section will always present some novel combinations of family interests, and much discussion may be expected

on the actuarial reports submitted to the Court. Section 13 concludes with a very important proviso in favour of creditors who have advanced money on the security of the heir-apparent's expectancy, and have intimated their security to the heir in possession prior to the recording of the instrument of disentail. This clause was adjusted with the Associated Scottish Life Assurance Offices, who have always done a large business on reversionary securities. In their report upon the Bill they say, "We assumed that it was not the intention of the Legislature to prevent transactions of this kind, and we urged that it was inexpedient, in the interests of all concerned, that the new Act should create any fresh difficulties in the way of such securities; that it should rather, if possible, obviate existing ones, so as to allow of such transactions being completed in a legitimate form, instead of being thrown into the hands of speculative lenders, by whom exorbitant terms might be exacted, on the ground of doubtfulness of title."

Sections 19 to 28 deal with the very important matter of sale. Formerly limited powers of sale were given for the purpose of clearing off debt. Here there is no such restriction. The heir in possession must go to the Court for an order, but apparently he is not bound to satisfy the Court that the sale is advantageous or for any reason desirable. Something of this kind may be implied in section 21, but it is not so stated. Heirs and creditors may appear to protect their interests in the price, but they are not entitled to oppose. The money is invested on the same trusts as those indicated by the deed of entail. Here, again, it will be observed that, apparently at the caprice of the heir in possession, land may be converted into money, and there can therefore be no theoretical objection to the further abolition of entail. There is a singular contrast between the part of this Scottish Entail Act and the provisions of section 3 of Lord Cairns' Settled Land Act, 1882. In the latter case the English tenant for life may sell the settled land, or any part of it, without going into Court at all, if he gives notice of his intention to the trustees of the settlement by registered post-letter. But, on the other hand, the Act declares expressly that the sale shall be made at the best price that can be reasonably maintained. It may be that the appearance in Court of heirs and creditors will practically have the same effect under the Scottish Act, but we confess to thinking that Lord Cairns has expressed himself with greater precision than Lord Rosebery.

Mr. Wood has produced a very handy edition of the Act with notes, which consist for the most part of useful references to the earlier Entail Acts. The analytical index to the whole Entail Acts, which appears at the end of the book, seems to be very intelligently and thoroughly done.

Bell's Dictionary and Digest of the Law of Scotland. A new edition.
By GEORGE WATSON, Advocate. Edinburgh: Bell & Bradfute.
1882.

After the lapse of more years than we care to remember, interrupted every now and then by a hopeful-looking advertisement, this latest edition of Bell's Dictionary has at last come to light. If the process of gestation has been laborious, the birth is at all events satisfactory, and is fitted to call forth much sincere and genuine congratulation. The size of the offspring is no doubt abnormal, being one of the thickest single volumes that we have seen; but this circumstance will render the new-born progeny of Mr. Watson's brain all the more fit to fight its way in the struggle for existence which goes on in the world of legal literature.

We may as well say at the outset that this work bears evidence on every page of the conscientious care of the learned editor. A great part of the contents has had indeed to be entirely rewritten, and the manner in which this has been done reflects much credit on the writer. The basis of the work is the edition of Professor Bell's Dictionary which was published in 1838 by Mr. William Bell. The exact words, in fact, of that gentleman have been retained so far as they still correctly represent either the present state of the law or the history of any particular term or phrase, while all new matter is distinguished by being inserted within square brackets. In this way the reader can see at a glance what is old and what is new in this edition, and he cannot fail to be struck in looking over the volume at the immense amount of original matter which is to be found in it. Nor is this to be wondered at when we consider the great changes which have taken place in every department of Scots Law since 1838. The system of conveyancing has been almost revolutionized, and the subject of mercantile law has been more and more assimilated to that of England. The articles on Bankruptcy, Insolvency, and Sequestration, for instance (which are from the pen of Mr. Andrew Mitchell, Advocate, and treated with great ability), are entirely new, and extend in all to upwards of forty pages, and several other similar instances might be given. The whole book, indeed, may be looked upon as practically a new work, and in no other have we an epitome of the Law of Scotland at once so complete and so handy.

It is somewhat difficult to review such a work as this. Its merits and usefulness are so apparent that it is wellnigh needless to draw attention to them, and although certain faults are unavoidable in a book of its size, dealing as it does with an immense variety of subjects, they are so few that it is a thankless and ungracious task to make mention of them. If we do allude to one or two it is in no spirit of fault-finding, but merely as an expression of opinion which may perhaps serve as a guide in the preparation of a future edition, which we hope will be called for in a much

shorter time than has elapsed since the appearance of the last. We venture to hope, too, that the size of the next edition will be a little less alarming than this, the proportions of which are quite Falstaffian. This is produced to a large extent by the retention of a large number of words and phrases, some of which are entirely obsolete, and others which one would hardly expect to find within the pages of a Dictionary of Scots Law. Many of the former class are very unlikely ever to be met with by the modern lawyer, and are of interest only to the legal antiquary, who knows the proper authorities to whom to apply for an elucidation of their meaning: such words as "Haimhaldare," "Origellum," "Essonzie," and "Yburpananseca" may be very interesting philologically, and important from an antiquarian point of view, but they can hardly be said to belong to the modern Law of Scotland, and are apt to make "foreigners" think our legal nomenclature even more barbarous than it (unjustly) gets credit for. No doubt it may be said that even the modern lawyer may chance to light upon such terms in old charters, but in this case he has always Skene and Ducange to fall back on, and the occurrence will be so unfrequent as hardly to justify the addition to the size of an already overgrown book by the insertion of such words. The other class of terms which we should hardly have expected to find within the pages of this book are those which have no connection at all with Scots Law, but are exclusively used in our sister country. Thus we have "Prerogative Courts," "Maihem," "Feofment," and a great many others, all of which may be found in their proper place in Tomlins' Dictionary. If both these classes of words had been left out it would have reduced the bulk of the Dictionary very considerably without, we think, impairing its usefulness as a work of reference. There are a few other words belonging to neither of these divisions which might also have been conveniently omitted. A Scottish lawyer of the nineteenth century has, thank goodness, little chance of being asked his advice as to the legality of an *Auto da Fe*, yet we have a dozen lines devoted to an exposition of the Act of Grace. There are, however, some very interesting bits of information scattered throughout the book, which, though not exactly legal, we could ill afford to lose. It is hard to see, though, why some should have been admitted without others: there is an instructive little note about the *Cocket*—a seal belonging to the custom-house; but why should the companion word *Tron* have been omitted? It was originally the weighing instrument, as the cocket was the measuring instrument, of the customs, and has left its mark on more than one locality in Scotland. Here is another scrap of curious and forgotten lore: it seems the word *Dusty Foot* occurs in the *Regiam Majestatem*, and we are here informed that "in England there is a Court called a Pie Powder Court held in fairs to do justice between buyers and sellers and to redress disorders committed in the fair, and there are traces of a similar

Court in Scotland, though it has long been out of use. Writers differ about the etymology of the word; but according to Lord Kames, Courts of *Pie Powder* are so called because fairs are generally composed of pedlars or wayfaring persons, who in France bear the name of *Pied Poudreux*, and in Scotland of *Dusty Foot*."

The more peculiarly legal part of the work we can praise with very slight qualification. The various articles are clearly and succinctly written, and contain a wonderful amount of information on their respective subjects. More than this, the authorities are always referred to, so that the student can always tell where to go for fuller details. Here and there of course there are a few slips, but they are comparatively trifling. Penal servitude for life is not now the punishment usually inflicted for incest, for the reason that when the prisoner is removed from Scotland after the expiry of several months in order to work out the rest of the sentence in one of the convict establishments in England, he is always set at liberty, incest not being a crime at common law in that country. Though the subject of Friendly Societies and Trade-Unions are treated in detail, we fail to find any mention of a class of society that was specially legislated for in 1876, and which involves the interests of quite as many people as either of the former classes, viz. Co-operative Societies. A few obsolete items have been allowed by oversight to remain uncorrected, as under the term "Outer House" it is stated that it is the name given to the Great Hall of the Parliament House in Edinburgh in which the Lords Ordinary sit as single judges to hear causes. The Lords Ordinary certainly sit in the Outer House, or rather they constitute the Outer House; but it is now a long time ago since they sat in niches in the wall of the Great Hall, hearing their cases amid the bustle and noise of the busy crowd which then thronged the floor of the Hall.

We have not space to enlarge further on the many points of merit which might be noticed in this book. Every effort seems to have been made to bring the information down to date, and it must have undergone no small amount of revision while in course of preparation. If it has any fault it is that of over-copiousness, but that is one which is easily pardoned. It is sure to take its place in the most convenient and accessible shelf of the lawyer's library, and will prove a mine of information not only to the practising man of business, but also to every one who is interested in the history of the growth and development of the Law of Scotland.

In conclusion, we must congratulate the learned author on the successful termination of what must have been very arduous and engrossing work.

The Month.

WE have been requested to publish the following notes:—

Notes as to the Effect of the Conveyancing Act of 1874 upon Personal Searches.—The opinions published in regard to this matter may be stated in the order of their publication:—

The editors of the second edition of “Bell’s Lectures on Conveyancing,” vol. ii. p. 706, state: “Notwithstanding that a period of possession of twenty years upon a recorded title will, after 1st January 1879, be sufficient for the positive prescription, the practice of requiring a forty years’ search in the Register of Sasines and for adjudications will no doubt still be continued after that date. Heritable securities are very frequently in force for a longer period than twenty years, and thus would not be disclosed by a search for that limited period; and this observation is applicable also to adjudications.” At p. 710 the editors also state that it will be unnecessary to carry back the search for inhibitions for a longer period than five years prior to the date of search. They do not state, but it appears to be implied, that a search thus effected will be complete as in the Adjudication Register, if it is made simply against the proprietors during the period of possession.

Messrs. Millar & Bryce, the professional searchers, sent round a circular in November 1878, in which they gave it as their opinion that “no change is made in the law as to adjudications; but inasmuch as the positive prescription of titles will be reduced to twenty years, it will not be necessary to search for adjudications beyond that period. A search in this register will therefore be against the individual proprietors during the period of proprietorship, but in no case beyond twenty years.”

“A search for five years will, as regards inhibitions *per se*, suffice. As, however, there may be other diligences in these registers not affected by the [1874] Act, such as sequestration under the Bankruptcy Statutes, interdictions, etc., which so limited a search would not disclose, if it is desired to have complete protection against such risks, it will be necessary that the search should extend over the period of twenty years embraced by the positive prescription.”

The editors of the new (the fifth) edition of the “*Styles of Heritable Rights*” state (p. 489) that searches should be made “in the Register of Abbreviates of Adjudications for the period from the date of recording the title which forms the foundation of the prescriptive progress, or earlier if required to show the discharge of any sequestration or recorded diligence, but not for a longer period than forty years in any case; and in the Register of Inhibitions for five years against the successive possessors of the property for the last forty years, within which period all inhibitions now prescribe, unless renewed in terms of the 42nd section of the Conveyancing Act of 1874.”

Mr. Wood, W.S., in the new (third) edition of Hendry’s “*Manual of Conveyancing*,” merely states (p. 315): “The periods for which searches for inhibitions are now asked are various; some still ask a forty years’ search, others accept a search for five years against all the proprietors for forty years. The search for adjudications is now generally made against the proprietors back to the infestment founding the prescriptive progress.”

These opinions might be criticised thus :—

It is a defect of the notes to “Bell’s Lectures,” that it appears to be assumed as sufficient if, along with a five years’ search in the Inhibition Register, a forty years’ search in the Adjudication Register against the successive proprietors, during the period of possession, is obtained. Such a search would fail to ascertain whether or not any of the proprietors during the short prescriptive period were or were not undischarged bankrupts. It ought to be against all the proprietors during the last forty years, back in each case for forty years from the date of search, and not for the period of possession merely.

It is generally thought that the opinion of Messrs. Millar & Bryce, that the alteration in the positive prescription has rendered it unnecessary to search beyond twenty years for adjudications, is erroneous. They assert that it has made no alteration upon the prescription of bonds, and there is no reason why it should take forty years to extinguish a bond, and only twenty years to extinguish an adjudication. If they are right as to adjudications, they must be wrong as to heritable securities. It may be that there is much to be said for the reasoning which alleges that if the positive prescription is to have full play,—if it is in any sense to create a property right,—logically, it must extinguish every limitation or burden adverse to its operation. This, however, is not the view of the profession, and for practical purposes must be laid aside.

The statement of Millar & Bryce as to inhibitions calls for no remark except the term “etc.” What is this intended to cover? Inhibitions, notices of sequestrations, reductions, and interdictions appear to include everything now recorded in the Inhibition Register.

The editors of the Styles do not condescend to give reasons for their opinion. This is unfortunate, on the one hand, in respect that had one known their reasons, these might have affected one’s opinion; and on the other hand, had reasons been stated, and one still remained unconvinced, one would have had less hesitation in differing from their great authority. The first assertion made by them is, that the search in the Register of Abbreviates of Adjudications should start from the date of recording the title which forms the foundation of the prescriptive progress, but not in any case for a longer period than forty years. If family estates be excluded, the foundation of the prescriptive title is not in the great majority of cases much beyond twenty years back. What then becomes of adjudications recorded before that date? They state that it may be necessary to search from an earlier period, “if required to show the discharge of any sequestration or recorded diligence.” If in any case this is necessary, why not in all? A search is made, not to show discharges of ascertained burdens, but to ascertain if there are any matters affecting the property requiring discharge. They go on further to state that a search is necessary in the Register of Inhibitions for five years against the successive possessors of the property for the last forty years. One might ask, If a search is good in the Register of Adjudications from the date of recording the title forming the foundation of the prescriptive progress (which may be much within forty years), on what principle should it be necessary to search against proprietors before that date in the Inhibition Register? If it be necessary, the result will be that a search will have frequently to be made against a person denuded before the date of recording the pre-

scriptive title. A search, say, is made, and although the proprietors referred to have been inhibited every day of their lives, the result as regards title is the same. These are not persons necessary to the title. If it were not that the long negative prescription of forty years is needed to extinguish adjudications, a forty years' personal search against each of the successive proprietors during the short prescriptive period would be sufficient. No alteration, however, having been made in the law of adjudications, a result ensues which was probably not contemplated. Conveyancers must obtain the names, and satisfy themselves as to the period of possession of the various proprietors during the whole period of forty years.

If any change is made in the old method of making personal searches, the position under the 1874 Act appears to be: 1. To render it unnecessary to obtain searches, *other than for adjudications*, against the grantor of (and proprietors previous to him) the prescriptive title. 2. To give the option of searching for forty years against each successive proprietor during the long prescriptive period of forty years in the Adjudication Register, instead of as formerly for the period of possession only. If this is done, the search is then completed by a search in the Inhibition Register for five years from the date of the search against all the proprietors during the short prescriptive period. It will be ascertained from the adjudication search whether or not any of the persons dealt with are undischarged bankrupts.

The above may be thus supported:—

It is necessary to search for forty years in the Register of Adjudications against each of the proprietors for the last forty years, because it is not certain that the 34th section of the 1874 Act has any effect—or rather it is pretty certain it has no effect—upon an adjudication against the property recorded, say thirty-nine years ago. A search against each proprietor for the period of his possession would disclose any adjudication affecting the property. This, however, would not be sufficient unless, as formerly, a search were given in the Inhibition Registers, because, as regards the proprietors during the short prescriptive period, it is in the opinion of the profession necessary to ascertain whether or not they are undischarged bankrupts.

It may be repeated that it is not necessary to search for inhibitions against a proprietor denuded before or by the recording of the prescriptive title. Inhibition does not attach property *per se*, but acts only as a restraint or limitation upon the powers of a proprietor. If possession has taken place for the prescriptive period upon a recorded "*ex facie* valid irredeemable title," it does not seem to be a competent subject of inquiry to question the powers of the disponent or his authors: power or not, the title is good.

Some minor matters may be here noticed:—

Notices of summonses rendering lands litigious did not, until the Consolidation Act of 1868, section 159, require to be registered. A search would not disclose any such impediment before that Act came into operation. A summons of adjudication would never be raised after the date of denuding the person against whom the summons was laid. A summons of reduction would practically in all cases be shown by the search in the

Inhibition Register for five years, as in all but a few cases a decision would be obtained before the expiry of five years. There is, however, a possible difficulty as to names. Suppose a summons of reduction were raised to reduce a deed granted ten years ago. A search, for example, had been obtained, say by the old methods, against the grantor and grantee of this deed, the search, if continued either by the old or new methods, would not disclose the summons in so far as laid against such persons.

Interdictions would not be completely shown by a search as suggested, but they may be said to be obsolete. At common law every deed is open to challenge, on much the same grounds which enables an interdicted person to obtain reduction of a deed.

The extension of the short prescriptive period to thirty years, where the plea of minority can be stated, does not affect personal searches. Such a plea is personal to the minor and his heirs. Creditors cannot found upon it as against the infestment of the minor's disponee.

Such, legally, may be the position of matters; but in the case of companies lending on heritable security, is it expedient to insist upon a theoretically complete search? If it became necessary to realize the security subjects, it would be necessary to sell under articles of roup. A general instruction to their law agents in all cases to accept a search in such terms as might be arranged, would free the agents of any responsibility. Expense is the universal reason urged in reply to a demand for a complete search. This, however, is misunderstood. It is very slight—3d. a year up to four names.

At the same time little risk would be run in dispensing with any personal search other than (1) a search in the Register of Adjudications against the successive proprietors during the period of twenty years, and that only as against each for the period of possession (which in the case of the first name occurring in the search would probably take it beyond the twenty years), and (2) against the same persons for five years from the date of search in the Inhibition Register. Adjudication has not been a common form of attaching heritage for some years, and as a matter of fact, although not of necessity, all subsisting adjudications now affecting property will be found in the property search. An adjudger, if not already in possession, is not likely to be content with simply recording his diligence in the Adjudication Register. The other danger, that of being an undischarged bankrupt, is somewhat mythical. It is a risk encountered daily in dealing with personal property. Again, any sequestration not disclosed by a search in the terms suggested, must have taken place before the property was acquired. If the trustee is to carry off the property he must present a petition under the 103rd section of the 1856 Act. From the notes appended by Mr. Murdoch to this section, it appears to be somewhat doubtful whether a duly completed right of a disponee of an undischarged bankrupt would not (in such a case of acquired property) be preferable to the right of the trustee, if completed before the petition was presented. A. acquired a property yesterday, comes to-day for a loan, and is asked for a forty years' search against himself, to show that he is not an undischarged bankrupt. One might exclaim why, and, in the same breath, why not? It may be finical, but who is to take the risk?

The New Law Courts.—In view of the recent opening of the portion of the Royal Courts of Justice which is to be occupied by the courts, it may be interesting to our readers to have a somewhat detailed description of the arrangements which have been made for the administration of justice.

The ground-plan of the building is in the form of a rectangular parallelogram, measuring about 450 feet on each of its four sides. Roughly speaking, the space enclosed within this boundary is occupied by an outer row of buildings and two interior quadrangles, one of which contains the central hall; or, perhaps, it gives a more correct idea to say that the plan consists of two quadrangles, round one of which are grouped the offices and round the other the courts, this last quadrangle being roofed over and forming the central hall. Eighteen courts, seven on each side and two at either end, surround the hall.

The first point which strikes the observer in approaching the main entrance is the care with which the main part of the building has been reserved for persons having business in the courts. The great hall may, no doubt, be used by the public as a lounge, but it cannot be used by them as an approach to the courts. There is no communication open to the public between this hall and the courts. The spectator who wishes to enter must do so by one or other of the doors on the right and left of the entrance to the central hall. Entering here, he will find a winding staircase leading to the second floor of the building, and affording access from a corridor running the whole length of the building to the gallery of each court. By means of this device the general public will be separated from those who are present on business, and, to a considerable extent, the overcrowding caused by loiterers coming from mere curiosity will be avoided.

The practitioners, witnesses, and suitors will enter the central hall by the main entrance. Coming from the Strand they will find themselves in an outer vaulted porch, on either side of which there are large rooms for consultations. Ascending three steps and passing through doors, an inner porch is reached, on each side of which are the staircases to the bar corridor. Passing through other doors the central hall is reached—a grand stone vaulted area, 200 feet long by 50 feet broad, divided on either side by clustered shafts into nine bays. Each bay has a long two-light window; at the south end there is a five-light window, and at the north end a triplet window. On either side there are five entrances leading to the rooms for jurors, witnesses, etc., and to the solicitors' corridor. On the same level as the hall are consultation-rooms of convenient size, the walls of which are covered with light-coloured tiles, and there are also rooms for witnesses and jurymen in waiting, from which there are separate staircases giving access directly to each court. Passing along a rather dark corridor we reach the court floor. It should be mentioned that the ground on which the building is erected slopes from north to south, with a steep incline towards the river, so that the level of the Strand on the south is 18 feet below the level of Carey Street on the north. The courts are on the Carey Street level, so that as one stands on the floor of the central hall, which is 3 or 4 feet above the Strand, the courts are all on the first floor, some 15 feet higher. Taking each row of courts as it runs along the side of the central hall, we find a corridor for the bar on one side, and a corridor for the judges on the other side. That for the

bar admits direct to each court; that for the judges is so arranged that on one side of it there are the private rooms to be occupied by the judges and their personal officers, and on the other are doors giving immediate access to the bench in each court, so that each judge can communicate with every other judge without more trouble than that of sending a message or making a short excursion along a private way. There are entrances to the building on the Carey Street front which are set apart for the judges, and which afford a direct and private entrance to their own special corridor. Every court is, as far as possible, removed from the noise of the street traffic outside, and no window giving light to a court looks out on the street. The courts receive light principally through the roof, and where there are windows they look out on a "well" lined with white glazed bricks; and by this means, not only is the greatest amount of light possible obtained, but air for the purpose of ventilation is also afforded.

The arrangements of the courts differ considerably. Taking, first of all, the court which is understood to have been originally intended for the Master of the Rolls, the scheme is as follows: The judge's seat is on a high platform, under a graceful oak canopy, and on either side are two oak stalls, probably intended for the rare distinguished visitors to the Bench of the Chancery Division. On a lower platform is a long table, destined for the registrar and judge's officers. Below this are the solicitors' seats, facing the counsel, and provided with a long table furnished with inkstands. There is room on shelves behind the seat for hats, books, and papers. The Queen's Counsel seats are immediately in front, within about fourteen feet of the judge, and extremely convenient for addressing him. The desks in front of these seats are sloping, and slide forward. They appear to present rare facilities for papers slipping down among the leaders' feet. But the most remarkable arrangement in this part of the court is that of the Queen's Counsel seats, which lift up like the seats of stalls in cathedrals. It is not, however, the lifting up, but the coming down, of the seat which is the point of difficulty. The seats are very heavy, and they are apt to come down with a crash which will have a fearful effect upon a nervous judge or counsel. Before the courts are occupied it will be necessary to put the learned leaders through a course of "seat-drill," training them to use the utmost caution in the descent of their seats. The first row of seats for the outer bar in this court is precisely similar to the leaders' seat, and behind this are four seats for the bar, ascending by steps, and behind them is the gallery for spectators. The shorthand writers' seats are on the right and left of the registrars' platform, on the level of the floor. The walls are lined with book-shelves, and the court is lighted by three two-light windows on either side and from the roof. The ventilation is secured by open panels in the roof. There is no provision at present for lighting, but we believe it is intended to place the electric light over the lights in the roof.

Taking next a court evidently intended for one of the courts of the other divisions, we find a different arrangement as regards the solicitors' seats. Here the solicitors sit with their backs to the counsel and facing the judge. In front of them are two tables. The jury-box is on the left of the judge. It contains three rows of seats, and there is a separate entrance for the jurymen. The witness-box is on the right of the judge,

immediately facing the jury. The arrangements as to seats for counsel are similar to those in the court last described, but there are eight rows of seats. The court is lighted from a cupola in the roof. The general effect of the courts is admirable. The proportions are good, and the fittings are all of solid oak, frequently carved and ornamented very elaborately. So far as can be judged by experiments in an empty court, the acoustic properties are extremely good. The only thing to be complained of in the court last described is the great distance which some of the counsel will be from the witness-box. The judge and jury will hear the witness perfectly, but it is questionable whether counsel will do so. The arrangements of the other courts resemble one or other of the models we have described, with some variation in the width of the solicitors' tables and in the breadth of the passages in front of them.

So much for the western portion of the building, which takes up two-thirds of the whole space. The great quadrangle, round which the eastern portion of the building stands, measures about 300 feet in length by about 100 feet in breadth. In this portion of the building, which begins on the south side in the Strand, and, starting from the clock-tower, which forms so conspicuous a feature in the building, runs up the whole length of Bell Yard and some distance along Carey Street on the north, are grouped on four floors some of the most important offices in connection with the courts. Facing Bell Yard we find the whole of the top floor occupied by the Chancery Taxing Masters. At the south end of the same portion of the building are placed the offices of the masters of the Queen's Bench Division on the court floor and the floor next above it; and the central office is placed on the ground-floor. At the north end on the court floor and the floor next above are the offices of the Chancery Registrars, and on the ground-floor those of the Chancery Paymaster and the Bank of England. At the north side of the great quadrangle, and on its western side, and also on the western side of the central hall, on the two uppermost floors, are the offices of the chief clerks of the judges of the Chancery Division. At the north end of the great quadrangle is the bar-room, on which the late Mr. Street has expended ornamentation with a profusion not to be found elsewhere in a building by no means deficient in ornament. Above the bar-room are the lunacy offices.

The original project for the building comprised more than nine hundred apartments, including twenty-two courts, but Parliament modified that scheme, and the estimate had to be reduced, and the amount of room afforded was restricted. As might have been anticipated, the reduced space is likely to prove insufficient for all the purposes for which the building was originally planned, and when the rooms required by the officers who have yet to be accommodated in the building have been assigned to them, it is more than probable that complaints will be heard of crowding and restricted room. Rooms have yet to be found for the officers of the Probate, Divorce, and Admiralty Division, and for several other officers, and it is by no means certain that space can be found for all. The only way to provide extra accommodation will be to make use of waiting-rooms or consultation-rooms, and so rob the profession and suitors of a portion of the benefit specially provided for them.

Underneath the central hall are six large boilers and a steam-engine, which are to be used in warming the building by means of the hot-water

pipes, whose ramifications extend throughout the passages; and, as regards the engine, in supplying power for lighting by electricity such portions of the building as it shall ultimately be decided to light in that way. While the corridors are warmed by means of hot-water pipes, the rooms are all provided with open fireplaces, and the consumption of coal will be, of course, enormous. It will scarcely be credited that the space for storage of coal originally provided by the architect was not sufficient for a fortnight's consumption. Fresh cellarage has now been provided on the west side. In various parts of the building there are lifts for the purpose of raising coal to the several floors, but the defect in most of these is that they have their openings on the landing on the stairs, and half-way between two floors. The sanitary arrangements are ample, and in the roof are large tanks of water for the service of the building and to supply the numerous hydrants set in every corridor for the protection of the building from fire. Among the minor defects in this large and admirable building, it may be noted that much of the stone with which the staircases are constructed and the passages paved is already wearing out. It must have been originally soft and unfit for its purpose. It will also be found that many of the staircases and passages are exceedingly dark, and unless they are kept continually lighted they will prove a source of danger to those who are not prepared for steps and pitfalls.—*Solicitors' Journal*.

The Salaries of Small Judges.—A comparison made between the salaries paid to magistrates and judges in various civilized countries leads, as most people are aware, says the *Globe*, to the conclusion that in Great Britain the judicial staff is better treated, and has a greater chance of being recruited from the most competent men, than anywhere else. It is in the case of judges occupying the highest position of all that this contrast is, perhaps, the most remarkable and the most in favour of our country; but there is also a strong balance to our advantage in the lower ranks of the judicial corps, as will readily be seen by a glance at the comparative table published by a French paper, which has been at the pains to collect these statistics. These figures show that in Italy, where the administration of justice is probably more scandalous than in any other part of Europe, the tariff of pay is also lowest, as the salaries of even the first class of *juges de paix* amount to less than £100 per annum. In Belgium, where there is only one scale of salaries for all officials in this position, the amount is £120; but in Switzerland, where the same rule prevails, it is no less than £180. In Austria and Holland there are three classes, and the pay ranges from £150 to £250, being uniformly higher in the smaller country, where the relative purchasing power of money is much less. In Germany the rate varies from £165 to £290, in Prussia from £150 to £375, and in Russia the officials corresponding to the *juges de paix* receive from £240 to £350. As for France, where there are no less than nine classes of judges of this description, their salaries vary from as high as £320 a year to as low as about £75. These

salaries are compared by the French statistician with those of the English County Court judges, set down at £1500, though he confesses that the functions of these latter officials correspond rather more nearly with those of the judges of the tribunals of First Instance than with those of the *juges de paix*. He forgets also to mention the fact that a very large part of the business coming before these last-mentioned dignitaries is done in England by the local magistrates, for whose services the nation pays nothing at all.

Abyssinian Law.—The courts of justice in Abyssinia are somewhat primitive places. The advocates plead tied together by their robes. While one is speaking no interruption is permitted, but as some concession must be made to long-suffering human nature pent up under the agony of hearing vituperations and allegations known to be false, the other advocate is allowed to grunt when he considers some passage in his opponent's speech particularly objectionable. A case is often settled by *bets*. For instance, a man will wager so many cows that he is in the right, and the other will do the same. The result is that the loser must pay his bet to the chief as a fine. In this manner a dispute about a matter of 5s. will cost a wordy individual who has trusted to the "glorious uncertainty" of Abyssinian law £10 or £12. We had something not very widely different once amongst ourselves, when cases could be decided by a wager of battle to an opponent in a court of law. An Abyssinian is a quarrelsome and excessively vain personage, and his litigious disposition is greatly owing to the possession of these dubiously commendable qualities.—*From "The Peoples of the World" for December.*

A Chinese Witness.—In California, where there are plenty of Chinamen, the usual Western method is employed in swearing them; so, at least, one may infer from the account of a recent trial given in the *Courier de San Francisco* of the 29th of September. The judge, evidently not being quite satisfied that the witness understood the object of the form he has just gone through, asked him, as is usual in such cases, if he understood the nature of an oath? "Perfectly," replied the witness, with the utmost confidence; "I know that if I tell a lie every one in the Court will be damned." An equally amusing illustration of the ignorance of the Chinese in the matter of our judicial oath was furnished some time ago by the native usher in the Consular Court at Shanghai. He was observed to be making an anxious search for some missing object; and, on being questioned by the judge, he stated that he was looking for the little book which is given to the witness to smell! And this man had been for eighteen years usher of the Court.

Maître Lachaud.—One of the most conspicuous figures at the French Bar has just passed away. Maître Lachaud occupied a

position not very unlike that of Scarlett at our own Bar, but with reference to a different class of cases. He began his career in the criminal courts, and it was in them that he achieved his greatest successes of later life. Originally a country *avocat*, he was brought into notice by a curious chance. The defendant in a *cause célèbre*, Madame Lafarge, happened to have heard Lachaud defending a prisoner, and was so struck with his ability that she at once engaged him to conduct her case. The ability and eloquence with which he defended his client secured him a widespread reputation, and in 1844 he removed to Paris. Here he gradually obtained a leading position, especially in the *Cour d'assizes*. He had an almost unrivalled power of exciting the sympathy and influencing the decisions of those whom he addressed. He conducted his cases with perfect skill and matchless eloquence, and it is not surprising that every prisoner was anxious to obtain his services. He was very popular with his brethren, and was elected in 1858, a member of the Council of Avocats. He had long been ill, but we believe that his death was unexpected.

WE were glad to notice that the Scottish Bar was so worthily represented at the opening of the English Courts in the person of the learned Dean of Faculty.

THE LAD FRAE COCKPEN.

[A married man who was butler to a gentleman in the parish of Cockpen went to Ireland, where he obtained a similar situation, both as a butler and as a married man. He was tried for bigamy before Baron Deasy and a jury at Maryborough Assizes, the learned judge remarking that they had often heard of the Laird of Cockpen, but now they had his butler. The prisoner was convicted and sentenced to five years' penal servitude.]

'Twas a lad frae Cockpen; he was proud and was great,
His mind was ta'en up wi' the married estate,
He had but ae wife, so he wanted anither,
For he said his auld wife might be almost his mither.

So he met wi' a lass, did this lad frae Cockpen,
And what was his errand he soon let her ken;
The answer she gied it is easy to guess,
She swithered a wee, and then she said "Yes."

This young Irish lass (she was Irish, ye see),
To gie her due credit she swithered a wee;
It's a trick of the trade just to tickle the men,
It's a way they've in Ireland as weel as Cockpen.

This new-married pair dwelt in the Green Isle,
 And happy they lived there—at least for awhile,
 Till the thing spunkit out—it's a way *it* has, then
 Who appears on the scene but the wife frae Cockpen.

He was ta'en up and tried 'fore the wise Baron Deasy,
 And at first he took it remarkably aisy;
 But he got his five years, and 'twas added that ten
 Would be little enough for this lad frae Cockpen.

Then (of course) he was seized wi' a sudden remorse,
 Said, "I'd raither been tried by the Laird of Glencorse;"
 And he sighed in his cell, where there's nae but and ben,
 "I was daft to desert my auld wife in Cockpen."

Correspondence.

(To the Editor of the Journal of Jurisprudence.)

ATTORNEY CERTIFICATES.

AS the amount of the licence duty is considered too low by your correspondent "A. L. J.," in a late number of the *Journal*, I have to refer him and such thinkers as he to the following "Statement" issued by the Law Society of London in March 1867 in support of the Bill then before Parliament to reduce the Annual Duty upon the Certificates of Attorneys and Solicitors, and others:—

"For many years prior to the year 1853, attorneys, solicitors, and proctors were subjected to the following taxation specially imposed on them, viz.: First, to a stamp duty of £120 on their articles of clerkship; second, to a stamp duty of £25 on their admission into the profession; and third, to a tax on an annual certificate, without which they could not lawfully practise in their profession—£12 was the annual certificate duty on those who practised in London, and £8 on those who practised only in the provinces; and one-half the tax was remitted in favour of those who had not been admitted for three years.

"In the whole range of special taxation of a class there is no other instance of this threefold taxation. One class may be taxed like the attorneys, solicitors, and proctors, on their articles of clerkship, or indentures of apprenticeship; another class on being admitted to their profession or calling, and another class on annual certificates enabling them to carry on their callings as auctioneers,

pawnbrokers, hawkers, or pedlars; but attorneys, solicitors, and proctors alone are subject to all these three kinds of taxation.

"In the year 1853 the stamp duty on articles was reduced by one-third, viz. from £120 to £80, and the annual certificate tax by one-fourth, viz. from £12 to £9 in London, and from £8 to £6 in the provinces.

"There are cogent reasons why attorneys should be relieved from the payment of the existing annual certificate tax by its reduction to a nominal amount.

"The annual certificate tax was imposed in the year 1785 to make up an expected deficiency in the shop tax. The shop tax has long been repealed, but the tax in aid of it has been continued to the present day. In England and Wales this taxation amounts in the aggregate to upwards of £68,000 per annum.

"The annual certificate tax is a grievous and oppressive infliction on a large class of deserving practitioners, the profits of whose business is of small amount. By many recent changes in the law and the practice of the Courts, the emoluments of attorneys and solicitors have been greatly diminished.

"A very large proportion of attorneys and solicitors do not derive as much as £200 a year from their profession, but they are nevertheless compelled to pay this onerous tax, which in London is equal to an income tax of sixpence in the pound on £360 a year, and in the provinces to an income tax on £240 a year, and to pay the income tax as well, and they are not exempted from any of the taxation imposed on the general public.

"The profession of an attorney is an honourable one; and every person, before he is permitted to enter into articles of clerkship, is subjected to an educational test, of a stringent character, and before admission to examination in the principles and practice of the law.

"An exclusive right to practise the profession is conferred on members of the Bar, and on members of the College of Physicians and Surgeons; yet they are not subjected to a special annual taxation like that which is imposed upon attorneys.

"A Bill for the repeal of this tax was first introduced in the session of 1850.

"The second reading of the Bill was carried on a division; and the principle of the Bill was again affirmed on two other divisions. After the Bill had passed through Committee, it was lost on a division, upon the third reading, taken at *three o'clock in the morning*. 483 members voted on these divisions; and if the fate of the Bill had depended on their votes taken on a single division, it would have been carried by a majority of 35.

"In 1851 the motion for leave to bring in a similar Bill was affirmed by a majority of 30 out of 308 members; but in consequence of the dissolution of Parliament the Bill was not again brought forward until 1853.

"On the 10th March 1853 the motion for leave to bring in the Bill was carried by a majority of 52 out of 386 members.

"Before the Bill was brought to a second reading, a resolution for the total repeal of *the advertisement duty* was carried.

"On that occasion the Chancellor of the Exchequer stated the impossibility of repealing the certificate tax, and also the *duty on advertisements*; and on the second reading of the Bill for the repeal of the certificate duty, he reminded the House that if both these duties were repealed, it was plain, from the statement he then made, that the financial operations of the country would have to be carried on, not on a *surplus*, but on a *deficit*.

"In consequence of this statement, 61 members who had previously voted *in favour* of the repeal of the certificate tax, voted *against it*, being driven to an alternative between the two duties.

"The reasons which induced those members to vote against the repeal of the tax on that occasion do not apply at the present time.

"Again, on the 19th May 1865, on going into Committee of Supply, a motion was carried, by a majority of 3 votes, in favour of the abolition of the duty.

"There are at present about 10,300 practising attorneys and solicitors in England and Wales, and 60 conveyancers, special pleaders, and draftsmen in equity.

"There are in Scotland about 1600 writers to the Signet, or procurators, including Parliamentary solicitors licensed in Scotland practising in London.

"There are in Ireland about 1200 practising attorneys, solicitors, and conveyancers.

"In the three countries, therefore, there are at present, in the aggregate, about 13,100 licensed practitioners.

"In England, there are about 4500 barristers, in Scotland, 400, and in Ireland 900—making together about 5800 persons exercising a profession not less lucrative than that of an attorney, who do not *contribute anything annually* to the revenues of the country with reference to their calling.

"If, therefore, it be admitted that barristers are properly exempted from the payment of any annual tax for the privilege of exercising their profession, upon what principle can it be maintained that attorneys, who are not remunerated at by any means so high a rate for their labours, should be subjected to the burden of an annual payment *amounting to nearly £90,000?*"

I quite agree with "Law Agent's" remark in your March number, that this tax should be abolished. I further think that it is high time a Bill was passed to prohibit M.P.'s from styling themselves writers, solicitors, etc.—in fact, that the admission of notaries should cease.

H. G.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF AYRSHIRE (KILMARNOCK).

Interim Sheriff-Substitute SYM and Sheriff CAMPBELL.

LYELL v. SMITH AND PETTIGREW.

The interlocutor explains the circumstances of the case :—

Kilmarnock, 12th April 1882.—The Sheriff-Substitute having heard parties' procurators, and considered the cause, Finds (1) that the pursuer, William Lyell, is a child in the sense of the Factory and Workshop Act, 1878, 41 Vict. c. 16; (2) that while at work in the defenders' factory on 20th May 1881, he was ordered by the defender Pettigrew 'to clean the frames' of a machine called a 'condenser'; (3) that this machine was at the time in motion for a manufacturing purpose; (4) that while engaged in the fulfilment of this order he stretched his arm across certain toothed wheels, which are 'mill-gearing' in the sense of the said Act, in order to remove some waste which was upon the axle of the condenser, and that while he was doing so his arm was caught between the said wheels, and so severely injured that it had afterwards to be amputated; (5) that the said mill-gearing was not fenced in accordance with the said Act, and that the accident to the pursuer's arm was caused by such want of fencing: Finds in law that the defenders not having, as they were bound by the said Act to do, securely fenced the said mill-gearing, are responsible for the accident and liable in damages to the pursuer: Therefore repels the defences, assesses the damages at £100 sterling, and decerns and ordains the defenders to make payment of the said sum to the pursuer and his curator *ad litem*: Finds the defenders liable in expenses and decerns: Appoints the pursuer to give in an account of his expenses, and remits the same when lodged to the Auditor of Court to tax and report.

JOHN DAVID SYM.

Note.—The Sheriff-Substitute conceives that the true decision of this case depends on the proper construction of the obligations imposed by the Factory Act of 1878. That Act provides (sec. 5, sub-sec. 3) that every part of the mill-gearing shall either be securely fenced, or be in such position or of such construction as to be equally safe to every person 'employed in the factory as it would be if it were securely fenced'; and mill-gearing is defined by section 96 as that 'by which the motion of the first moving power is communicated to any machine appertaining to a manufacturing process.'

"The mill here in question is driven by water-power. The shaft driven by the water-wheel is connected by a belt and pulley with the axle of the large cylinder of the condenser. On the other end of that axle are placed the wheel marked A on No. 7 of process and the pulley in front of it. That wheel A drives the wheel B, and that pulley is the medium of communication of the power of the water-wheel to a part of the machine called the 'licker' or 'breast.' The Sheriff-Substitute thinks that the wheel A, and the wheel B which it drives, thereby communicating motion to some of the numerous small cylinders shown on No. 7, and the pulley also are mill-gearing in the sense of the definition just quoted. It was argued that the 'mill-gearing' is all on the other side of the condenser from that at which the accident happened, the part, namely, of the machine to which the motion of the wheel is first communicated by the belt coming up from the floor below, and working the pulley by which the axle itself is turned. That part of the machinery is certainly mill-gearing, and would require to be fenced but for the alternative provision (in which the recent differs from the older Factory Acts) that mill-gearing, if not fenced, may be in such a position or of such construction as to be equally safe as if it were fenced; but the Sheriff-Substitute thinks that the wheel, pulley, and belt carried by the other end of the axle (that at which the accident occurred), and which are the means of direct communication of motion to the machinery just

as much as the belt and pulley by which the axle is itself turned, are also equally with them within the definition of section 96. It is not merely that part by which the motion is *first* communicated that is 'mill-gearing.' The Sheriff-Substitute has not come to this conclusion without difficulty, having regard to the able argument for the defenders on this head. He was indeed referred by the pursuer's agent to the case of *Holmes v. Clarke* (6 H. & N. 349, and 31 A. J. Ch. 356). That case is referred to in a note to the recent edition of Fraser on 'Master and Servant,' p. 700, as an authority for the view just expressed; but the Sheriff-Substitute, on a careful examination of that case, thinks that the decision turned almost entirely on another point, and he has not therefore felt at liberty to regard that case as an authority conclusive of this question.

"The pursuer, then, being one for whose behoof this provision was intended, was engaged at work which brought him very near the unfenced gearing. As to the precise orders he received, the Sheriff-Substitute thinks it clear that these orders were to 'clean the frames,' and that the order was not confined, as Mr. Pettigrew says it was (though the Sheriff-Substitute is very far indeed from imputing to him any wilful misstatement), to the side of the machine next the wall. This order made it the pursuer's duty to clean the 'bend,' which is that part of the frame above and beside the wheels *A* and *B*, and the pursuer seeing waste on the axle close to these wheels, put his hand over to remove it, and was caught by the wheels. That is exactly the sort of accident which the Factory Acts are intended to prevent. It was argued that the putting of his hand where he did was a thing so obviously dangerous that he must be held to have contributed to his own injury. The Sheriff-Substitute does not say that such a plea is altogether excluded where, as here, the duty imposed by the Factory Act has been neglected, but it is a very different plea to maintain, and looking to the scope of the Acts and to the construction they have received in such cases as that of *Traill* (45 Jur. 540), he cannot here give it effect. Apart indeed from the statutory provisions, he should have thought the plea a very strong one. The pursuer is a well-grown and intelligent boy, and was certainly thoughtless in putting his arm where he did. There is evidence that he had been warned against touching parts of the machinery at which he would be likely to be hurt, and the boy Wardrop, who seemed a truthful and intelligent witness, says that he would have thought this a dangerous place even before the accident.

"The pursuer attempted to establish that this accident occurred in the full view of Pettigrew, who was, the pursuer says, looking on while he was engaged in the operation at which he was injured. The Sheriff-Substitute feels it his duty to say that he thinks that part of his case (in itself not very probable) not established by the evidence of the pursuer and Kelly, or by the evidence of the pursuer's mother and John Burns, as to a conversation which took place with Pettigrew after the accident. The statement of the mother, 'he said he stood there and saw it done,' is plainly exaggerated. Burns does not corroborate her, and though he is somewhat in conflict with Pettigrew as to this conversation, the Sheriff-Substitute much prefers the evidence of the latter. Burns was not a witness who impressed him favourably, and that quite apart from the circumstance, to which the Sheriff-Substitute attaches no importance whatever, that he has been convicted of a trifling offence.

"It is no doubt a point in the defenders' favour that the Government Inspector in his numerous visits to the mill never made any remark upon the want of a fence to the wheels which caused the accident. That is accounted for by the circumstance that the junction of the two wheels is hidden by the pulley, and it was indeed maintained (though the Sheriff-Substitute rejects the contention) that the pulley was quite a sufficient fence. The view already expressed is, it is thought, conclusive of that matter. There is a great deal of evidence to the effect that such wheels as those that caused this injury are not in practice, and indeed cannot, at least without great inconvenience, be protected by a fence. On such a matter one unskilled in machinery must speak

with diffidence, but the Sheriff-Substitute can see no reason for doubting the evidence of the witness Andrews, that such a fencing as would have prevented this accident could be erected perfectly well. If the foregoing findings are correct, the statute requires it.

"The pursuer contended that he was entitled to judgment under section 9 of the Act, which forbids the allowing a 'child' to clean any part of the machinery in a factory while the same is in motion. Looking to the circumstance that the boys employed in this mill seem to the Sheriff-Substitute to consider an order to clean the frames as including an order to clean the flat surface of the wheels marked *F*, and to the evidence that these wheels were sometimes cleaned when the mill was going, the Sheriff-Substitute thinks that there is much to be said for that view of the case, apart altogether from the question whether the provision referred to is intended to prevent children from cleaning any part, moving or stationary, of a machine which is in actual working, or is merely intended to prohibit a child cleaning a part of the machinery which is itself in motion. He does not, however, base his judgment on this part of the case.

"The damages have been assessed at £100, because that amount has been more than once given by the Supreme Court in similar cases, and seems also a suitable sum in this particular case. J. D. S."

On appeal the Sheriff pronounced the following interlocutor, adhering to the judgment appealed from:—

"*Kilmarnock*, 18th October 1882.—The Sheriff having considered the appeal for the defenders with the reclaiming petition in support thereof, answers thereto, proof productions, and whole process, Adheres to the interlocutor appealed from, dismisses the appeal, and finds the defenders liable to the pursuer in expenses of the appeal. N. C. CAMPBELL.

"*Note*.—This is an important case, and has been very ably argued on both sides. I have read and considered it again and again, and the result is that I have been more and more convinced that the judgment appealed from is well founded. The defenders have a wool-spinning mill near Mauchline, in which the machinery, including mill-gearing, is driven by water-power. The pursuer is a boy of twelve years of age. He was in the defenders' employment when the accident happened that deprived him of his right arm. He was employed about the machinery when it happened. He was quite new to the work, having been only three weeks in the defenders' service. By the defenders' orders he was cleaning part of the machinery while the mill was going, and his arm was caught by the working of two revolving toothed wheels, wheels by means of which the motive 'power was communicated' to a piece of machinery, or in the words of the Act to be immediately referred to, a machine 'called a condenser' appertaining 'to the manufacturing process' of the mill. And it is too well known to be disputed that the working of such revolving wheels, unless sufficiently protected, is very dangerous, especially to young, ignorant, and inexperienced people like the pursuer, when employed working among or about machinery while it is in motion. Indeed one main object of the Factory Act is just to give protection to such young people against the inconsiderate rashness or folly incident to youth, ignorance, and inexperience. It is contended on the part of the pursuer that the protecting clauses of the Factory Act were not complied with by the defenders, otherwise the accident would not have happened, and that they are therefore liable to him in reparation for the injury sustained by him. What, then, are the requirements of the Act? Section 5, sub-section 3, enacts 'that every part of the mill-gearing shall either be securely fenced or be in such position or of such construction as to be equally safe to every person employed in the factory, as it would be if it were securely fenced.' The only observation that occurs here is that the wheels by which the pursuer's arm was crushed were not fenced; and that it is sufficiently proved that they were not 'equally safe to every person employed in the factory as they would have been if they had been securely fenced.' But

the defenders contend that the section above quoted does not apply to the wheels in question, because, as they aver, they form no part of the 'mill-gearing,' and therefore did not require fencing at all. This point will be dealt with by-and-by. The next section founded on by the pursuer is as follows, viz.: 'A young person or woman shall not be allowed to clean such part of the machinery in a factory as is mill-gearing while the same is in motion, for the purpose of propelling any part of the manufacturing process.' As already observed, the pursuer was cleaning part of the machinery when the accident happened, and I have no doubt that it was dangerous for him to do so, and that there was nothing in his conduct at the time to bar his remedy in this action. If, then, the wheels in which his arm was caught were part of the 'mill-gearing' in the sense of the statute, he is entitled to damages. But, as already mentioned, the defenders contend that they form no part of the gearing, and they have led evidence to prove this. Now what is the meaning of the terms 'mill-gearing' as used in the statute? The statute itself defines it as follows in the interpretation clause No. 96, viz.: 'The expression "mill-gearing" comprehends every shaft, whether upright, oblique, or horizontal, and every wheel, drum, or pulley by which the motion of the first moving power is communicated to any machine appertaining to a manufacturing process.' The first and most important witness adduced by the defenders is Mr. Stokes, Inspector-General of Factories for the West of Scotland. In the beginning of his evidence he says, 'I know the provisions of the Act defining mill-gearing.' Interrogated: 'Do you consider that these wheels (viz. those in which the boy's arm was caught) are wheels by which the motion of the first moving power is communicated to the machine?' Answer: 'I think that is a matter of opinion. It would require a technical man to answer that question.' Here, then, is the most important witness declaring that he is not competent to answer the question. But being pressed to give 'his opinion,' but of course not as an expert or a skilled witness, he says, 'I look upon them as part of the machine itself.' In cross-examination, however, he makes a pretty clear statement in favour of the pursuer's contention (p. 45 of proof). It is as follows: 'These toothed wheels A and B' (the wheels in question) 'are part of the medium of communication by which the motive power is communicated to the machine, and that motive power is the water-wheel.' If this be a sound opinion, it of course negatives the defenders' contention. The only other witness for the defenders of any importance on this point is William Tannock, an engineer and machine-maker in Kilmarnock, and he says on cross-examination (p. 77 of the proof), 'I do not know what mill-gearing is in the sense of the statute.' But he goes on to say, 'The toothed wheels A and B' (those in question) 'are part of the means by which the power of the water-wheel is communicated to the side of the condenser on which those toothed wheels are.' The only skilled witness for the pursuer is Allan Andrews, an engineer of forty years' experience (proof, p. 19), and he quite decidedly states that the wheels in question are 'wheels by which the motion of the first moving power is communicated to the machine.' In these circumstances the weight of evidence is with the pursuer; and putting my own construction upon the Act, assisted by the evidence respecting the machinery of the mill, I am of opinion that the wheels in question do form part of the mill-gearing. The Sheriff-Substitute, who is of the same opinion, has gone very fully into the grounds on which his judgment in favour of the pursuer is founded, and I need only add that I entirely agree with him on all points. N. C. C."

Act.—Carruthers—*Alt.*—J. & J. Sturrock.

SHERIFF COURT OF PERTHSHIRE.

Sheriff-Substitute BARCLAY.

THE PROCURATOR-FISCAL v. JAMES H. GLASS AND OTHERS.

Night-poaching case.—The following notes fully explain the case:—

"This complaint is presented under the Summary Procedure Act and the

Night Poaching Act, 9 Geo. IV. c. 69, sec. 1. The accused are all and each charged—(1) that by night (22nd August 1882) they ‘unlawfully entered or were in a field on the farm of Meikle Obney, with a certain number of nets and wooden pins’ or other engines or instruments for the purpose of taking or destroying game;’ and (2) on the same night were unlawfully in a field on the farm of Nether Obney, with the like quantity of nets and wooden pins, for the same purpose of taking game.

“The facts which appeared in evidence are, that on the night in question, between twelve and one o’clock A.M., the four accused parties were first found by four gamekeepers or assistants accompanied by a county policeman on the first-mentioned farm, the accused having a horse and cart and a dog; they were carrying several bags containing nets and pins and slippers, all proved to be articles used by poachers. Wilkinson was at this place taken into custody by the policeman and conducted to the police-station at Auchtergaven. Subsequently the other three accused were found at the second place libelled between four and five o’clock in the morning; the horse was then unloosed from the cart, the bags with the above-mentioned articles were in the cart, and the three accused were in its neighbourhood. The accused when taken alleged that they had the liberty of the tenant of the farm to take rabbits there, but the tenant when brought to the place denied any such liberty. It was not proved that the accused had taken any game or rabbits, or that the nets had been at any time spread for the capture of animals.

“It was sworn by a netmaker called in exculpation that there are two distinct and separate kinds of nets, one for the capture of hares, having larger meshes and stronger cordage than nets made to catch rabbits, and placed at a much higher altitude, and consequently requiring larger pins. The prosecutor’s witnesses corroborated the fabricator as to nets made separately for the capture of hares and others for rabbits, but the evidence went clearly to show that a hare might be caught in a net set for rabbits. There is the like distinction between hare and rabbit snares with the same accidental capture of animals of a different kind than intended. An instance of this appears in the case, 29th October 1881, *Laurie and Others* (4 Couper, 346). The solicitor for the accused raised a question whether the place where the parties were found was a field. It was proved that it had been an old road, but now enclosed. He also raised a doubt whether the times were proved to be within the prohibited hours. As to the time of the first charge there could be no doubt, but as to the second there might be somewhat of a doubt. But as to the place and time there was sufficient evidence to convict on both charges.

“The question is, whether there is evidence to convict the accused as being unlawfully in trespass ‘with engines or instruments for the purpose of taking or destroying game.’

“The Act libelled, like many others in the Statute-Book, is very peculiar in its construction. There are two modes of perpetrating the offence created under the 1st section, but only one offence. First, ‘unlawfully taking or destroying any game or rabbits in any land, whether open or enclosed,’ during the specified hours of night. The accused did not take or destroy game or rabbits. The second mode is unlawfully entering or being ‘in any land, whether open or enclosed, with any gun, net, engine, or other instrument for the purpose of taking or destroying game.’ The word rabbits is here omitted. It can scarcely be supposed that the draughtsman or the legislative body omitted the word ‘rabbits’ by inadvertence. It occurred in the sentence immediately preceding. Although it had been a mere omission, it is beyond the power of a magistrate to supply the omission. The offence is not *malum in se*, but only *malum prohibitum*, and it cannot be carried further than the very letter of the prohibition. ‘Penal statutes are strictly interpreted.’ The ‘words of a statute themselves do best declare the intention of the Legislature.’ It would be dangerous to take the spirit or intention of a statute in preference to its letter.

“There is a well-known distinction between game and rabbits. It was held in the case, 13th February 1828, *Moncrieff*, ‘that a tenant may without

consent of his landlord kill rabbits for the preservation of his crops.' Indeed they have been judicially designated as 'vermin.' Rabbits may be made the subject of property in warrens, and a species are tamed and domesticated, and may be the subject of theft.

"The Act 7 and 8 Vict. c. 29, expressly recognised and extended the Act 9 Geo. IV. c. 69, so as to include roads and highways, and also includes 'game and rabbits,' but requires their actual taking or destruction. The preamble of the statute sets forth that the original statute had been evaded and defeated 'by the destruction by armed persons at night of game or "rabbits."'

"At one time during the discussion of this case, on the reasoning above noted, the Sheriff-Substitute was inclined to hold that as the nets in possession of the accused were primarily designed only for the purpose of netting rabbits, though game might accidentally be caught by the net, and as neither game or rabbits being found in the possession of the accused, they should be acquitted, and he issued notes to that effect. But after further hearing and consideration, he is now convinced that this is not a fair logical conclusion. It is not perhaps easy to perceive the reason for the omission of rabbits in the 2nd clause of the statute. It must be admitted that the four accused persons, had they been successful in taking a single rabbit, must have been convicted. It is not easy, therefore, to perceive how the accused can escape on the fact that they went by night with an engine designed and intended for the capture of rabbits, and so long as their intention was unsuccessful there was no offence, but where success attended their intention they immediately became offenders.

"The scope of the whole Act 9 Geo. IV. c. 69, proceeds on the assumption of a trespass in pursuit of game, and is designed for the prevention of poaching by night, and is grounded on the unlawfully taking or destroying any game or rabbits in any land, or unlawfully entering or being on any land with instruments for taking game. Some slight ray of light may be found for the omission of rabbits in the 2nd clause of the 1st section by reason that a tenant has right at common law to destroy rabbits unless excluded by covenant.

"It is significant that the accused did at the time allege that they had liberty from the tenant to net rabbits, but which was not alleged or proved in defence. The tenant, or parties authorized by him, may by night take measures by nets or snares to capture rabbits; but a tenant is prevented destroying game, as has been found, 8th March 1818, *Smith* (28 Jurist, 338; 2 Irvine, 402). No gun or instrument is allowed him by night which might destroy or capture game. This is not altogether satisfactory, but may be taken as somewhat of a guess on the omission of rabbits in the 2nd clause.

"On the whole, from the facts proved as above narrated, it appears—(1) that the four accused were during the hours mentioned unlawfully on certain lands with instruments for poaching, and although the nets were primarily designed to capture rabbits, they were capable also of taking game, and if game, or even rabbits, had been taken, they would unquestionably have been convicted. (2) Neither of the accused were tenants of the farms or authorized by the tenants to set rabbit-nets. They were all resident at distances from the place, and they had with them a cart and a dog with other articles designed for poaching, and that in a wholesale manner. Had any of the party of four been armed with a gun, or any other offensive weapon, they would have fallen to be dealt with under section 9 of the Act, even were they only in pursuit of rabbits. If it were to be held that any person may enter land at night with a net, though designed only for the capture of rabbits, but which might also ensnare game, and yet that there was no offence unless game or rabbits were actually captured, it is easy to perceive what great encouragement would be given to poaching, and an immunity granted to the poachers. H. B."

Act.—The Fiscal.—Alt.—Stewart.

A fine of £1 was awarded against each of the four accused parties. A case was demanded, but the appeal was fallen from.

SHERIFF COURT OF CAITHNESS (WICK).

Sheriff-Substitute SPITTAL.

GOVAN COMBINATION v. WICK AND INVERNESS.

This was an action at the instance of the inspector of poor for Govan Combination, Glasgow, against the parishes of Wick and Inverness. In order to avoid expense of litigation the parishes consented to abide by the decision of Sheriff Spittal, if he would allow the case to be tried in his small-debt roll; and to this Sheriff Spittal kindly consented. The action was for payment of £5, 10s. 2d., being expenses incurred by the Govan Combination in connection with the board and keep of Margaret Shields, a pauper, in their poorhouse, and who was born in Wick, and was said to have acquired a settlement in Inverness. Wick alleged that Inverness should pay Govan, but to this Inverness objected on the ground that Shields was born in Wick and had not acquired a settlement with them.

A minute of admissions was tendered by the parties as follows: "It is admitted that on 24th November 1880 Margaret Shields became chargeable to the Govan Combination Board, and was relieved by the pursuer as inspector thereof, and that the pursuer's advances on her behalf amounted, with interest, to £5, 10s. 2d., as concluded for. 2. The said Margaret Shields was the lawful daughter of the late George Shields, draper or pedlar, who died at Inverness on 10th November 1880, also of Margaret Morell, the mother, who at present resides at Inverness. 3. The said Margaret Shields was born at Wick on the 19th October 1861. When about three months old, her parents, who had been temporarily residing in Wick, left Wick for Inverness, and she was taken with them, and resided with them at Inverness from that time till 1873, when she went to service in the parish of Lairg, Sutherlandshire, where she remained about a year. At the time she went to service as aforesaid her father had acquired a residential settlement in Inverness, and he and his wife continued to reside in Inverness from the date they left Wick till the date of his death. Indeed the mother has resided there since his death up to the present time. 4. Margaret Shields returned to her father's at Inverness in 1874, and resided there till 10th June 1878. About 10th June 1878 she went south, and was in service in various parts of the country, until, as stated, on 26th November 1880 she became chargeable to the pursuer's board. 5. George Shields, the pauper's father, had at his death a residential settlement in the parish of Inverness, no interruption having taken place in his settlement there from the time the daughter left in 1873 till the date of his death."

The case was debated on Tuesday, 17th October, and it came up on Tuesday, 31st October, for decision, when Sheriff Spittal delivered the following judgment:—

"The pauper, Margaret Shields, was born at Wick, where her parents then resided, on 19th October 1861. A few months thereafter, her father left Wick, and went with his whole family to Inverness, where he resided until his death on 10th November 1880.

"In 1873, Margaret Shields, being then about twelve years of age, went to service in Sutherlandshire, and after about a year's absence returned to Inverness in 1874. She resided thereafter in her father's family in Inverness until 10th June 1878, when, being then in her seventeenth year, she left Inverness and went south. She never returned to Inverness, but was in service in various places in the south until 14th November 1880, at which date she became chargeable as a pauper in Govan parish. Govan now seeks repayment of the advances made by it on behalf of the pauper, calling as defenders, (1) Wick, the parish of the pauper's birth, and (2) Inverness, the parish where the father of the pauper had his residential settlement at the time of his death.

"Wick denies liability, contending that the pauper acquired a derivative residential settlement from her father in Inverness, which settlement she still retained at the date of her becoming chargeable in Govan.

"Inverness, on the other hand, contends that the pauper was forisfamiliarated before her father's death, thereby losing his Inverness settlement and falling back on the parish of her own birth.

"Wick relies on the case of *St. Cuthbert's v. Cramond* (12th November 1873, 1 Rettie, 174). Inverness cites *Craig v. Craig and Macdonald* (18th July 1863, 1 Macpherson 1172), *M'Lennan v. Waile* (28th June 1872, 10 Macpherson, 908), and *Ferrier v. Kennedy* (8th February 1873, 11 Macpherson, 402).

"None of these cases are precisely similar to the present, and it is not easy to gather from the opinions of the judges in these cases what rule of law ought to be applied to settle the present dispute.

"I have come, however, after examining these and other cases, to be of opinion that the pauper, Margaret Shields, has her settlement in the parish of Inverness.

"A good deal was said in the debate as to whether the pauper was or was not forisfamiliarated. My view on this point is shortly this, that her absence in Sutherlandshire during part of 1873 and 1874 did not amount to forisfamiliaration, but that she remained an unforisfamiliarated member of her father's family until June 1878, when she left Inverness finally for service in the south. At that date, June 1878, admittedly her father had a residential settlement in Inverness. It seems clear on all the authorities, that if at that time the pauper had been a *minor pubes*, she would then have had a residential settlement in Inverness, derived from her father. In point of fact, the pauper was not then a *minor pubes*. She was in the seventeenth year of her age, but still living in family with her father, unforisfamiliarated. If she had at that time become chargeable, her father being alive, but unable to support her, I think it is clear that Inverness would have been liable for her support. On the morning of 10th June 1878, therefore, I hold that the pauper had a residential settlement in Inverness, not indeed entirely acquired by herself, but enuring to her from her father.

"Did the pauper lose that derivative residential settlement on going south, and if so, at what point of time did she lose it?

"The last-reported case bearing on the point is that of *St. Cuthbert's v. Cramond* cited above, decided by the Second Division in 1873. Lord Justice-Clerk Moncreiff there says, 'In regard to the question of residential settlement I think there are three principles well established by decisions—(1) That where a residential settlement is acquired by five years' industrial residence, it is acquired for the individual himself, and also for his children in family with him; (2) That the children acquire the settlement in their own right. These two propositions were decided in the Lasswade case before the recent statute. In *Hume v. Pringle* a third proposition was decided that such a derivative residential settlement is retained or lost under the provisions of the 79th section of the Poor Law Act. If it were true that whenever a pauper is forisfamiliarated he begins a new course, and his father's settlement comes to an end, the decision in *Hume v. Pringle* could not have been pronounced.' And he then refers to the case of *Allan v. Higgins* (23rd December 1864, 3 Macpherson, 309), where Lord President Inglis (then Lord Justice-Clerk) says, 'Looking to the fact that the pauper was a minor pauper, unforisfamiliarated in 1852, I have no doubt that the seven years' residence of the father in Monkland did confer on the child a residential settlement there at that time. But such a settlement continues to subsist only on certain conditions—nobody can, as a matter of course, hold it in perpetuity. The words of the Act of Parliament are, "No person," etc. In applying this provision to a case of derivative residential settlement, these propositions are clear: First, so long as a child lives in family with the father, if the residential settlement of the father be kept up by continuous residence for one year in every period of five years, the settlement of the child will be preserved, even if the child should be accidentally absent during the year's residence, because the same kind of residence which was sufficient to acquire the settlement for the child is sufficient to retain it. Second,

if after the child has acquired such a settlement she is forisfamiliarated, it depends on the child spending one year out of every five in the parish of her residential settlement whether it will be retained.'

"If these cases stood alone, there would be no difficulty. But then, unfortunately, there are the cases of *Ferrier* and *M'Lennan*, in which there are *dicta* entirely opposed to this view.

"In *M'Lennan* Lord President Inglis says, 'A person who has no residential settlement in his own right is chargeable on the parish of his birth if he is above the age of puberty, and as soon as he does attain the age of puberty, his father being dead, his settlement is in his birth parish, in preference to any derivative settlement which he previously had.' While Lord Kinloch says, 'In regard to all emancipated children, I hold the case of *Craig, supra*, to settle that their arrival at puberty, *eo ipso*, discharges any settlement derived from a parent, and in default of any other settlement throws them on the parish of their birth.'

"In *Ferrier* the Lord President repeated his opinion in *M'Lennan*, and the other judges concurred in the decision. These opinions are not reconcilable with the case of *St. Cuthbert's*.

"Lord Moncreiff's commentary, however, on the cases of *Craig, M'Lennan*, and *Ferrier*, contained in his opinion in the case of *St. Cuthbert's*, satisfies me that the law laid down by him in *St. Cuthbert's* is most in accordance with the authorities, and must rule the present case.

"Statements of what appears to me to be the law are to be found in some of the opinions in the case of *Craig*, especially those of Lord Neaves and Lord Kinloch. These judges no doubt were in the minority in that case; but there the father, who died in 1851, had no residential settlement at the time of his death, and the son did not become a pauper till 1857, when he was sixteen years of age, at which time he had no residential settlement in any parish, facts not all resembling those of the present case.

"Lord Kinloch says, 'I do not find it anywhere laid down that the arrival at a particular age changes the settlement. In the case of minor children it is not age that has been regarded, but emancipation or forisfamiliaration. Even in the case of emancipation I can find no authority for holding that the emancipated child, *eo ipso*, throws off the derivative settlement, and places his settlement in the parish of his own birth. The effect of emancipation is simply to invest the child with the capacity of acquiring a settlement by residence, not previously possessed. Until such settlement is acquired his settlement by parentage remains.'

"And similarly Lord Neaves says, 'I am not aware that the attainment of any period of life, or, except where the statute has said so, the simple lapse of time, can ever instantaneously change a person's settlement, so that he shall go to bed at night with one settlement and rise in the morning with another. I do not conceive that an emancipated child thereby loses instantly its parentage settlement then existing, unaffected by posterior changes in the parents' settlement, and liable to be changed only, in some recognised manner, by the conduct or history of the child itself.'

"Margaret Shields therefore, in my view, having on the morning of 10th June 1878 a residential settlement in Inverness, took that settlement with her when she went south. She took with her also the capacity for losing that settlement and acquiring a new residential settlement for herself. But such new settlement she never acquired, because before she had time to lose her old one she became chargeable as a pauper. The result is to give decree against Inverness."

Act.—Hector Sutherland.—*Alt.*—G. M. Sutherland and *M'Lennan*.

SHERIFF COURT OF FORFARSHIRE (DUNDEE).

Sheriffs TRAYNER and CHEYNE.

INSPECTOR OF POOR, BARRY v. DAVID AND WILLIAM FERRIER.

Aliment—Husband—Insane wife—Liability of father-in-law to aliment his son's wife.—Held that a calender-worker, making an average wage of £1, 6s. 4d. per week, and having a family of five, was liable to contribute a sum of 2s. 6d. per week towards the maintenance of his wife in a lunatic asylum. Held also that the father-in-law, a factory-worker, making a wage of about 22s. per week, was liable to contribute a further sum of 2s. 6d. per week towards the maintenance of his son's wife in the asylum.

In this case Hugh Hanton, inspector of poor, Barry, for and on behalf of the Parochial Board of said parish, sued David Ferrier, calenderer, Carnoustie, and William Ferrier, factory-worker, Carnoustie, for the sum of £35, 12s. 6d., being the amount disbursed by the pursuer as inspector foresaid for the maintenance of the defender David's wife in Sunnyside Asylum, Montrose. The circumstances of the defenders and the facts of the case are fully brought out in the subjoined interlocutors and notes :—

“ *Dundee, 30th October 1882.*—The Sheriff having resumed consideration of the process, Finds (1) that on or about 1st June 1881 the defender David Ferrier, who is the son of the other defender, William Ferrier, applied to the pursuer as inspector of poor of the parish of Barry, within which parish he was residing and had his settlement, to have his wife, Mrs. Agnes M'Kenzie or Ferrier, removed as a lunatic to Sunnyside Asylum, near Montrose, and on same day the said Mrs. Agnes M'Kenzie or Ferrier was, after the usual procedure, admitted to the said asylum, where she has since been maintained by the Barry Parochial Board ; (2) that the pursuer, as representing the Barry Parochial Board, has disbursed for the maintenance of the said Mrs. Agnes M'Kenzie or Ferrier the sum of £35, 12s. 6d., conform to the account annexed to the petition, which sum covers the period from 1st June 1881 to 15th November 1882 ; (3) that the defender David Ferrier's circumstances are not such as to admit of him at once relieving the pursuer of the whole of said disbursements, or doing more than contributing towards the reduction of the debt at the rate of 5s. per week, but that the defender William Ferrier, though not in very good circumstances, is possessed of some heritable property and in a position to meet the pursuer's claim : And having regard to these findings, and to what is contained in the minute No. 9 of process, decerns against the defenders for payment to the pursuer as inspector foresaid of the sum of £35, 12s. 6d. sterling, with interest thereon, as craved in the petition, but subject to the declaration, (a) as regards David Ferrier, that the decree will be sufficiently implemented by him paying the amount decerned for in weekly instalments of 5s. each ; and (b) as regards William Ferrier, that in the event of him paying to the pursuer the sum of £17, 15s. within ten days after this decree becomes final, the balance may be paid off by weekly instalments of 3s. each, reserving entire William Ferrier's right of relief against David Ferrier ; and reserving also the pursuer's claim for any future advances he may make for or on behalf of Mrs. Agnes M'Kenzie or Ferrier, and the defenders' answers thereto : Finds the pursuer entitled to expenses, allows an account of these to be given in, and remits the same, when lodged, to the Auditor of Court to tax and report.

JOHN CHEYNE.

“ *Note.*—This is, like all cases of the kind, an unsatisfactory one to dispose of, and it has given me great anxiety ; but on the whole I have come to think, that however much one may feel for the defenders, who are really not far removed from pauperism in having this burden thrown upon them, the pursuer is entitled to his decree against both of them, and that I go as far as I fairly can in the way of indulgence when I qualify the decree in the way I have done.

“ I note that at the discussion the defenders' agent offered to add a plea raising the question whether a father-in-law is bound to support his son's wife in the event of the son being unable to do so himself. I am of opinion that that question is not now open, having been settled by the case of *Duncan v. Hill* (17th February 1810, F. C. 591), and therefore I have not thought it necessary to put the defenders to the expense of amending their pleading in the way proposed.

J. C.”

On appeal by the defenders the Sheriff-Principal altered as follows :—

“*Edinburgh, 1st December 1882.*—The Sheriff having considered the reclaiming petition and answers Nos. 14 and 15, together with the productions and whole process, Recals the interlocutor appealed against: Finds in fact (1) that on or about 1st June 1881, Agnes M’Kenzie or Ferrier, wife of the defender David Ferrier, was on the warrant of the Sheriff-Substitute of Forfarshire (proceeding upon an application at the pursuer’s instance, of which No. 17 is a copy) removed as a lunatic to the Royal Lunatic Asylum near Montrose, where she still remains; (2) that the pursuer, as inspector of poor for and representing the Parochial Board of the parish of Barry, has disbursed for the maintenance of the said Agnes M’Kenzie or Ferrier in said asylum, as from said 1st June till 15th November 1882, the sum of £35, 12s. 6d.; (3) that neither of the defenders are in circumstances which admit of their maintaining the said Agnes M’Kenzie or Ferrier in the said asylum, although they are both in circumstances which admit of their contributing to such maintenance: Finds in law, that having regard to the circumstances of the defenders respectively, they are not liable in the sum sued for, but only part thereof: Therefore, and with reference to the subjoined note, finds the defender David Ferrier liable to the pursuer in the sum of £9, 10s. sterling, and the defender William Ferrier liable in the sum of £9, 10s. sterling, *quoad ultra* assoilzies the defenders: Finds the defenders entitled to expenses since the date of closing the record, and remits the accounts thereof, when lodged, to the Auditor to be taxed on the lowest scale, and to report, and decerns. JOHN TRAYNER.

“*Note.*—The present action is brought by the pursuer to recover the amount disbursed by him for the maintenance of Agnes M’Kenzie or Ferrier in the Montrose Asylum, and is directed against David Ferrier the husband and William Ferrier the father-in-law of the lunatic. There can be no doubt of a husband’s liability to maintain his wife, whether lunatic or sane, provided she continues to live in family with him; but when it becomes necessary to put in force the provisions of the Lunacy Act in regard to a wife, and to remove her from her family to an asylum, the husband’s obligation (in ordinary circumstances absolute, as I have stated) admits of some qualification, according to the extent of his means. ‘When a married woman comes to be a lunatic, being the wife of a labouring man, this difficulty occurs: he himself is not a proper object of parochial relief, but the law takes away his wife from his family, and sends her to be maintained in a lunatic asylum at an expense far greater than he can bear. It is reasonable that the law which deprives him of his marital rights should provide for the maintenance of his wife in the asylum, the confinement in which is prescribed on grounds of policy’ (per the Lord President in *Palmer v. Russell*, 1st December 1871, 10 Macph. 189); accordingly, it is provided by the 77th section of the Act 20 and 21 Vict. c. 71, that the expense of removing a lunatic to and maintaining him in a lunatic asylum shall fall on the parish of the lunatic’s settlement, unless the lunatic has estate of his own out of which such expense can be defrayed, or unless it is borne by his relatives. In a recent case (*Beattie v. Grozier*, 7th June 1881, 8 Ret. 790) the same authority from whom I have already quoted says, ‘The Lunacy Acts provide that the sufferer must be sent to an asylum, and if it is clearly established that the father is unable to pay for the son’s maintenance, it is only in that case that the parish can be called upon.’ I need scarcely observe that the same rule applies to husband and wife. The question then arises, Is the husband unable to pay for his wife’s maintenance in the asylum? and the answer to that question in the present case is not doubtful. The defender David Ferrier states (and it is admitted by the minute No. 9 that he correctly states) that his wages amount to 19s. per week. He has five children, two of whom are employed, and whose wages amount to 7s. 4d. per week. The income of the whole family therefore I take to be £1, 6s. 4d. per week. Two of the younger children are maintained by their grandfather (the defender William Ferrier), and there are thus David Ferrier and three children (one of them at school) to maintain on £1, 6s. 4d. per week. It seems to me that to allow 6s. per week for the maintenance, clothing, education, etc., of each of these four persons would not be extravagant, and that would amount to £1, 4s., leaving a balance of 2s. 4d. per week out of the week’s income. I think I would be if anything stretching a point in the pursuer’s favour if I ordained David Ferrier to pay him 2s. 6d. a week towards the support of his lunatic wife, and I do not know that I would have done so had the defender David Ferrier not offered in his defences

to contribute that sum. I think it is certainly as much as David Ferrier can in his present circumstances reasonably be called upon to pay. The account sued for covers a period of one year and twenty-four weeks, and at 2s. 6d. per week that amounts to £9, 10s. sterling, for which I have given the pursuer decree; and as I think that is the full amount of the husband's liability for the period in question, I have assolized him *quoad ultra*. With regard to William Ferrier the case stands thus: He is an old man between sixty and seventy years of age (with a wife nearly as old), and he supports, as I have said, two of his grandchildren. His wages are said to be £1 per week, and he has a small property which yields a net return of about £5 per annum, or 2s. per week. His wages are said to be paid more in recognition of past services than in payment of services he can now render. His age renders this statement very probable, and there is nothing proved to the contrary. I take it, therefore, that he has £1, 2s. per week on which to support four people, and I do not think it wonderful if it does not do much more. But he also offers 2s. 6d. a week, and I should certainly not ordain him to pay more towards the support of his daughter-in-law, the lunatic in question. I have therefore decerned against him for the sum of £9, 10s. as the full amount of his liability.

"I have stated that William Ferrier is the proprietor of a small property, and it seems to be contended that out of it or its proceeds he should pay the pursuer's claim. I cannot sustain this contention. William Ferrier's wages might cease at any time, for his age precludes the idea of his being long able to do any work or earn any wages whatever. I know of no authority for saying that he is to dispossess himself of the little capital he has, in order to meet such a claim as the pursuer's. If he contributes to the liquidation of that claim out of what is his present income without meddling with his capital, I think he does all he can be called on to do. To take away his capital now by such demands would very soon bring him as a burden on the rates. Whether William Ferrier is bound to contribute to any extent to the maintenance of his daughter-in-law is a question on which I do not enter, because I think with the Sheriff-Substitute that the case of *Duncan v. Hill* (although it proceeded on some specialities) determines that the father is bound to support a son's wife, although curiously enough it also settles that he is not bound to support a son's widow. The authorities on this subject are not in a very satisfactory state, as may be seen from the *résumé* of them given in Fraser on 'Parent and Child,' second edition, 104 *et seq.*

"I have allowed expenses to the defenders because they tendered in their defences the sum for which they have now been found liable, but only since the date of closing the record, because their previous tender made extrajudicially referred to future, and did not include past advances. This offer was only made on 30th August 1882 (No. 12 of process), by which time Mrs. Ferrier had been about fifteen months in the asylum.

"This judgment only deals with the particular account sued for, and if any material change occurs in the circumstances of the defenders, that might affect their liability for any advances or disbursements made after 15th November 1882, at which date the account now sued for closes. J. T."

Alt.—Watt & Cæsar.—*Act.*—Paul, Dickie, & Paul.

SHERIFF COURT OF ZETLAND.

Sheriffs THOMS and RAMPINI.

SMITH v. ABERNETHY.

Debts Recovery Act—*Competency of an action for cash advances*.—Such an action has been held incompetent. The circumstances of the case are disclosed by the following interlocutors:—

"*Lerwick*, 15th November 1882.—The Sheriff-Substitute having heard parties, made avizandum, and considered the summons and note of pleas, proof, and productions, Finds in point of fact that the goods referred to in the account were—with the exception of the sum of 18s. 4½d., as to which the proof is not sufficient—supplied, and that cash advances to the extent of £112, 14s. 3d. were made by the pursuer to the defender during the periods stated: Finds in point of law that the cash advances detailed in the said account do not fall

under the provisions of the Debts Recovery Act as recoverable by summary procedure: Therefore, as the cash advances amount to a greater sum than the sum sued for, dismisses the action, with £4, 1s. of expenses in favour of the defender against the pursuer, and decerns.

CHARLES RAMPINI.

Note.—In a case where, like at present, there is a *penuria testium*, the evidence of the pursuer, and of his business books, which appear to have been as regularly kept as most books generally are in Zetland, by the two clerks of the pursuer now deceased, must be held as sufficient, especially as the defence is at best only a hypothetical one. The Sheriff-Substitute has thought it his duty to give effect to the defender's additional plea, though it was recorded after the proof began; and as he can find no authority for the recovery of cash advances in this form of action, he has been obliged to strike them out of the account. The item 18s. 4½d., G. R. Tait, is not sufficiently vouched.

“He avails himself of this opportunity to remark upon the unsatisfactory nature of the system of business carried on between the pursuer and the defender. He is aware that such a system is found throughout Shetland, but he hopes that in time this mode of dealing, which is destructive of all independence on the part of the fishermen, and is certainly attended with ruinous disadvantages to the merchant, will disappear from our midst. C. R.”

The pursuer appealed to the Sheriff (Thoms), who pronounced this interlocutor and note:—

“*Lerwick, 30th November 1882.*—The Sheriff having considered the pursuer's appeal, with the whole process, Dismisses said appeal, and affirms the interlocutor appealed against, and finds no additional expenses due, and decerns.

“GEO. H. THOMS.

Note.—The Sheriff thinks the objection to competency was timeously stated here. As regards the plea as to the appropriation by the creditor of indefinite payments, that appropriation must be before action (per Taunton, J., in *Philpott v. Jones*, 10th November 1834, 2 A. & E. 41). As regards the cash advances, which here are not in any way incidental to the other entries, the principle is the same whether the advance is 1s. or £10, and to that extent the remedy of the Debts Recovery Act is unavailable (*Grant v. Fleming*, 10th December 1881, 9 Rettie, 257). The Sheriff agrees with the Sheriff-Substitute in dismissing the action, if for no other purpose than to avoid if possible the penalty imposed by section 2 of the Act, which extinguishes the creditor's claim for any remaining portion of any such debt beyond the sum actually concluded for in any such action. G. H. T.”

Notes of English, American, and Colonial Cases.

SOLICITOR.—*Injunction—Solicitor acting in opposition to former client.*—The jurisdiction of the Court to restrain a solicitor who has acted in one proceeding from acting in a subsequent proceeding for the party opposed to his former client is not confined to the case where the solicitor has discharged himself, but extends to the case where he has been discharged by the client.—*Little v. Kingswood and Parkfield Collieries Co.*, 51 Law J. Rep. Ch. 498.

“The decisions of the Irish Courts to that effect in *Hutchins v. Hutchins* (1 Hogan's Reports, 315) and *Biggs v. Head* (Sausse & Scully, 335) approved and adopted.—*Ibid.*

Seemle, the true test to be applied in such cases is to consider whether the second proceeding so flows out of or is connected with the first, as that the solicitor must be presumed to be in possession of information bearing upon the matter in dispute.—*Ibid.*

The principle of *Cholmondeley v. Clinton* (19 Ves. 261) considered and explained.—*Ibid.*

limits for a solution of the problems either of physical or national life.

For example, the law of evolution has determined the development of man from a simple microcosm ; but it has also determined the development from a like protoplasmic germ of the elephant, the horse, the alligator, and the salmon. It is clear that in the line of the elephant, the horse, the alligator, the salmon, the law of evolution cannot lead us to the race of man. The variation, due to whatever cause, begins at a very early stage in existence, and so long as there is life existent there will be variation of form. This must be so, otherwise we should have the ultimate development of all the varied species of living creatures to man, and a planet with no sentient beings as dwellers but men—even though these were of diverse types and innumerable degrees of development—would be rather a queer and uncomfortable place to live in. We may take it, therefore, that evolution has its limits in the physical world.

Applying the same reasoning to political institutions, we admit the operation of the law of evolution, but only within limits. The germ of all political States is in the family, but evolution does not necessarily lead, by a well-marked progress from the family or the crudest State founded directly on family life, to Mr. Herbert Spencer's ideal State, with its dual legislative body, its elective executive, and its honorary and honoured head. Dr. Arthur Mitchell, in his course of Rhind Lectures, has conclusively shown that there is a law of degradation at work in the life of States coincident with the law of evolution, employing the latter in its progressive sense.

As in the physical world there are variations of types springing from the primordial germ, so in man himself there are variations due to environment and the conditions of his existence. These variations are accentuated by temperament, climate, and a hundred other agencies which may easily be surmised. As with individual men, so with the family ; and as with the family, so with the nation. There cannot, from the nature of the case, arrive a time when variation will cease. The tendency rather will be to emphasize the variation, and to mark nation from nation with more distinct idiosyncrasies.

But if the law of evolution does not lead us to one common type, either physical, mental, social, or political, it operates in the development of men and nations along the line of their distinct variations. And this development in a race is the outcome of climate, of the great struggle which, Dr. Arthur Mitchell has pointed out, man everywhere engages in against the iron law of the survival of the fittest, of the contact of one race with another. These facts of individual, family, social, and national life act and react upon custom ; law is built upon custom, and law, though the result of, always directly moulds political institutions. From what has been urged, it may, we think, be maintained, "that there are necessary, and as such, unchangeable conditions in the life and development

of separate communities, just as there are necessary and unchangeable conditions in the existence and development of separate plants and animals; that these conditions are discoverable, not only proximately, but absolutely, just as the conditions of life and development in other departments of nature; and that when so discovered and enunciated, they determine the objects which international law must seek to vindicate in all departments and in all possible changes of relations which may result from the progress and retrogression of national life."¹

Little assistance is afforded by the views of either of the two British schools of political philosophy, or by their representatives on the Continent, in our study of Political Ethnology, or in an inquiry into the influence of race in the development of international or even of municipal law. But the life of men and of nations is a perennial revelation of the laws by which that life—individual and national—is governed. And may we not attempt to ascertain whether there is in the facts of history and political life a quickening impulse which clearly points to special developments of law? Confining attention for the present to international law, a question precedent is, "What is international law?" The law of nations has been defined by Professor Lorimer as "the law of nature realized in the relation of separate communities," by which is meant, the condition in which each separate nation has the right to be, and to develop itself in accordance with its ideas, or with the special character which its nature has imposed on it. Now, it will be conceded that a nation has a right to be and to be recognised as a nation if it have a specified territory, a measure of civilisation, internal order, and a settled form of government. The question is not whether a perfect combination of these requirements has been attained by any particular nation or by all recognised nations. Jurisprudence has only to do with the perfection of the relation, not of the subjects related; and our main object, therefore, is to discover in what respect the perfection of this relation is governed by race peculiarities and race instincts. It were wise, surely, to admit that the law of the relation between constitutional England and Hungary must be different from the law of the relation between imperialistic Germany and republican France, or between the United States of America, whose ideal is that of a federal union of independent States, and Russia, whose ideal is that of communalism and the personal delegation of power; and that if a perfect *entente cordiale* between such diverse nationalities is to be maintained, regard must be had by rulers, diplomatists, and jurists to this specialization of the law of the relation. If so, there would be less occasion for international jealousies and fewer of those misunderstandings which inevitably lead to war.

But, further, the law of the relation must be based on the recognition of the right of each nation to develop itself in accordance with its ideas or the special character which nature has imposed

¹ *Institutes of the Laws of Nations*, by Professor Lorimer.

on it. It has been said by Jhering of Göttingen, that the life of nations is not a coexistence of isolated beings, but, like that of individuals in the State, it constitutes a community; it translates itself into a system of causality and of reciprocal action—pacific and bellicose, of disorder and apprehension, of borrowing and lending; in a word, it constitutes a gigantic exchange, embracing all phases of human existence. The law of the physical world is as that of the intellectual: life is composed of the admission of things from without and of their inward appropriation; reception and assimilation are the two main functions whose presence and equilibrium are the conditions of existence and of vitality in every living organism. To put an obstacle to the admission of things from without, to condemn the organism to develop itself “from within outwards,” is to kill it. Expansion within outwards commences only with death. Further, Jhering argues that a nation which isolates itself not only commits a crime against itself, since it casts aside the means of perfecting its education, but it renders itself guilty of an injustice towards other nations. Isolation is the capital crime of nations, for the supreme law of history is community. A people which recoils from the idea of contact with a foreign civilisation,—that is to say, from the education of history,—has by the very fact lost the right to exist. The world has a right to its fall. Now this is but an expansion of what Professor Lorimer has aptly termed “the necessary interdependence of States and the inevitable solidarity of their interests;” and there is nothing to find fault with in the principle so interpreted, but everything to commend it. But the use to which the argument has been put by the German school in their treatment of the Slavonic question—to take a concrete illustration—must be repudiated. For example, the Germans seem to employ it thus: No nation has the right to stand alone, to isolate itself. Above all, the Slav race ought not to resist the education of history. The teaching of experience, *i.e.* of history, is that the German ideal of government and civilisation is the highest; the Slavs have no business to have such an ideal of their own: *ergo*, they must accept *nille wille* German standards. Shorn of the rhetoric in which the argument has been somewhat obscured, this is but the gospel of force: that the weak must invariably give place to the strong. Whatever is true in the argument, as thus presented, is commonplace. No one denies that national aspirations and national aims must ever be modified by contact, more or less close, with other nations; but no nation has a right to impose on another either its laws, its customs, its civilisation, or its political constitution, if these be foreign to the genius of that other nation, and while the laws, customs, civilisation, and political constitution of the latter possess inherent vitality. The aim of every nation or race is, or ought to be, to develop from within outwards; and instead of expansion from “within outwards” commencing only with death,—that is, with the extinction of the national idea,—it is only when the national idea springs

into vigorous life that expansion from within outwards becomes possible. Reviewing the astounding advances which have recently been made in material prosperity in Japan, and the development of a civilisation which promises to become truly unique and national, Miss Bird, in her *Unbeaten Tracks in Japan*, says: "With the impetus of the new movement, springing mainly from the people and from *within*, — not from without, — we have undoubtedly two of the elements of permanence."

Jhering's argument, as applied by the Germans, means that all nationalities must succumb to the Teuton; that every conception of government and of social and political institutions must give place to the German. We seem even to have an echo of this in Goethe. "Humanity advances," says the master mind of Germany, "but in a spiral line. The mediæval centuries, in which Northern barbarism alone seemed to prevail, resulted in the civilisation of the North, and the development at last of the mighty Teutonic energy which has since been renovating the world." But may not this mighty energy be itself exhausted? Who doubts that with the direction it has taken in the Germany of to-day in favour of Absolutism and Cæsarism, it will very speedily exhaust itself? And may not the barbarism of the Slavonic races result in a civilisation which, too, may play its part in renovating the world? And may not the English ideal—essentially different from that of the Teutonic, and which has left its impress on so many parts of the world to the incalculable good of mankind—find a further development in America or Australasia, and that again give place to some higher and more robust conception of the destiny and government of the race? Professor Fiske of Harvard, U.S.A., has expounded some such notion in various of his historical and ethnological studies.

Or take the other view, viz., that it is unnecessary to postulate the supercession and superimposition of one development of civilisation by another. It is, we are inclined to think, more philosophically and historically true to contend for the specialization of race ideals. If the barbarism of the North has developed into Teutonic civilisation, which undoubtedly has had an important influence upon the moral and political government of the world, may there not, side by side with this development, be an evolution of other nationalities and races, each of which shall be called upon in its own sphere to play a great part in the regeneration of mankind? "The Romans could not surpass the Greeks in art, but they went forward in their own direction, that of government and jurisprudence (supreme in the interests of the world); and modern civilisation borrows from both Greece and Rome."¹ And again: "A law of progression is imposed on human destiny, raising the level of manners and of literature from epoch to epoch. This progression is indefinite, and advances with the growth of institutions—that is to say, with the tendency to republican government

¹ *Madame de Stael*, by A. Stevens, LL.D.

and republican manners [in France], and will have for its distinctive character the triumph of the serious spirit of the North over the frivolous spirit of the South."¹ "The Greek architecture," writes Dr. Stevens, "may be perfect in its kind, and may therefore never be surpassed; but the Gothic may also be perfect in its kind. Which is preferable is not the question. The world has both. Is the world richer with both than it would be with one? is the only question. Does the world grow rich from age to age in ideas and in truths?" And the answer in both cases must be in the affirmative. So along the line of their ideals may not the Anglo-Saxon conception of parliamentary and constitutional government be perfect of its kind? may not the Teutonic ideal of military organization and personal government be perfect of its kind? may not the Gallic ideal of republican rule be perfect of its kind? may not the Slavonic ideal of communalism and delegation of power be perfect of its kind? may not the American ideal of federal government be perfect of its kind? And yet the question, "Which is preferable?" need not be discussed, for the world may be richer for all. Such ideals may be the conceptions, and, so far as put into practice, the realization of great truths, each having an important sphere in the providential government of the world. Charles Nodier epigrammatically declared that "literature is the expression of society." Commenting upon which Vacherot said: "Works of art and of literature are no longer considered as products of free individual minds alone, as Plato, Aristotle, Horace, and Quintilian taught; but modern criticism sees in them the genius of the race, of the epoch."² Applying this theory to politics, may we not argue that political institutions are the expression,—tentative it is true, but still the expression of the aspirations of a race, of a nation,—a groping after that political perfectibility adapted to and consistent with its genius? And may not modern criticism see, in this department of research, each successive stage in the development of the political ideal of a race, not the product of a Samarin, of a Bismarck, of a Cavour, of a Thiers, of a Gladstone, of a Lincoln, of a Serrano, not the product of those individual minds alone, but the expression of the genius of the race, of the epoch? Under the influence of these diverse and permanently dissimilar ethnical impulses, varied types of nationality must co-exist; and if ever international jurists are to attain to a system of positive international law, they must have regard to race tendencies and national ideals. Unless they do so they can never discover the true law of the relation between separate communities, and therefore never can construct a solid basis from which the rights of each nation can be recognised, and the duties of each enforced.

¹ Vinet's *Etudes sur la Littérature Française au XIX^e Siècle*.

² *La Science et la Conscience*, by Vacherot.

FOURTEENTH REPORT OF THE JUDICIAL STATISTICS OF SCOTLAND FOR 1881.

CRIMINAL STATISTICS OF COUNTIES AND BURGHS.

(Continued from vol. xxvii. p. 17.)

THE first portion of this report for 1881 contains what may be termed the "criminal statistics," namely, "*police, criminal procedure, prisons and prisoners*," all which we have analyzed and abridged. The second portion contains the *civil statistics*, comprehending the statistics of all the Civil Courts in Scotland, both Supreme and Inferior. The first table is given to the "Outer House" of the Court of Session. It is a comparative table of the business in the Outer House for five years ending in 1881. It presents the numbers in a variety of phases, many of which appear of little practical importance. It is of no consequence to learn how many cases have been *transferred* from one Lord Ordinary to another, seeing that they still *remain* within the walls of the Outer House; or how many processes have been initiated by *summons*; how many by *petition*; and lastly, how many by neither, but by some "*other writ*," or how many cases "of procedure required closed records," and how many did *not*. Omitting such inferior and useless details, we content ourselves with excerpting what in this table are of real importance in connection with the Outer House:—

	1877.	1878.	1879.	1880.	1881.
Cases in dependence within the year	2371	2446	2366	2279	2360
Final judgments	1120	1174	1160	1110	1263
Causes taken out of Court otherwise than by final judgments	415	447	508	364	342
Causes in dependence at the end of the year	828	821	687	735	644
Judgments for pursuer	818	921	882	850	975
Do. defender.	270	229	230	240	260
Do. mixed	32	24	48	20	28
Costs for pursuer	634	732	713	605	649
Do. defender.	152	132	119	128	153
Without costs for pursuer	167	159	153	147	207
Do. defender	76	73	89	94	103
Costs from common fund	21	11	9	17	20
Costs otherwise disposed of (?)	70	67	72	119	131
Final judgments on verdicts	13	8	1	11	15
Without verdicts	1107	1166	1159	1099	1248
Verdicts for pursuer	6	7	1	7	8
Do. defender	4	1	0	4	7
Mixed verdicts,	3	0	0	0	0

A second table deals with the business in the Inner House for the same years. The same immaterial facts occur in this table as in the former. It is of no practical importance to discover how many cases were *transferred* from one Division to the other. There appears here a most astounding discordance between the figures. Neither is it easy to perceive how in one case the transference can be made to increase the gross number of cases in dependence, and

the other to lessen that number. We limit an analysis of this table to what is of any consequence:—

	1877.	1878.	1879.	1880.	1881.
Cases in dependence	1024	1242	1238	823	966
Final judgments	580	586	854	590	576
Taken out of Court	122	102	147	119	95
Left in dependence	217	384	152	134	174
Judgments for pursuer	326	341	476	362	347
Do. defender	220	191	335	187	200
Do. mixed	34	54	43	41	29
Costs for pursuer	152	170	205	128	151
Do. defender	169	149	259	152	171
Without costs for pursuer	162	157	254	214	181
Do. for defender	44	45	74	32	32
Costs from common fund	22	28	19	28	7
Costs otherwise disposed of (?)	31	37	48	36	34
Final judgments on verdicts	17	12	3	2	9
Final judgments without verdicts	563	574	851	588	567
Verdicts for pursuer	9	9	0	2	5
Do. defender	8	3	3	0	4
Do. mixed	0	0	0	0	0
Results of judgments from Outer House—					
Adhered to	143	128	138	112	125
Repeated, but on different grounds	8	7	8	5	1
Reversed	40	43	43	48	49
Partially adhered and partially reversed	18	16	12	12	13

These tables of business in the Outer and Inner House are most important, and indeed might supersede all further details. They show the rise and fall of business, the uniform success of the pursuers in contrast with that of the defenders, and the distribution of costs. They undoubtedly establish that recourse to juries is still not a favourite with Scotch litigants.

The above two tables contain an exhaustive report of all details of business done for five years both in the Outer and Inner Houses of the Court of Session. Another table follows, confined to the Outer House, but only for the year 1881. It is entitled "Proceedings in the Court of each Lord Ordinary," with a "general balance" and an "analysis." The names or titles of the Lord Ordinaries are withheld, and instead there are certain cabalistic letters given, called the "*office marks of Court*." To the uninitiated these mysterious letters are enigmatical. It appears from the first table that there were 735 cases during the year 1881 treading their "weary way" through the cold portals of the Outer House *sub frigido Jove*, of which *R. J.* had the clerkship of only 53, whilst his next neighbour, *M. D.* (not Doctor of Medicine), had no less than 220 under his charge. If the spell were broken, and the public were let into the secret of the Lord Ordinaries at whose tables the alphabet is distributed, the fact would be divulged what Ordinary or oracle received most favour from prosecutors, as to them alone has in Scotland been given the choice of their judge, both in the Outer and Inner sections of the Temple of Justice. There follows a table showing in what year the appeal to justice was *first* initiated. Twenty columns are set apart for the date of the *first* cry for

justice, beginning in the year 1845, but eight of which columns remain untenanted, which appears to an onlooker to be a useless waste of paper. It appears from this chronological table that the "*oldest inhabitant*" of the cold region of the Outer House was born on 1st June 1848, and after 33 annual pilgrimages under the fostering care of I. S., is still alive in the year 1881; another sprang into life in 1857, a third in 1860, a fourth in 1862. These four rank as the patriarchs of litigation, and still embalm the memory of a "*guid ganging plea*." As the empty columns draw to a close, we find one case still on the rolls which was initiated in 1873, two in 1874, other two in 1875, three in 1876, seven in 1877, thirteen in 1878, seventy-two in 1879, and a crowd of 631 in 1880. Few, if any, will be concerned whether the pleas commenced with a summons or a petition, or by neither the one nor the other, but by "*writ*" (unknown in Scotch law). Another table is set apart for 35 cases, transferred from one Lord Ordinary to another, with the usual array of empty columns. It would be curious to learn the judges from whose rolls, so greedily run upon, these transferences were made to increase the less-favoured rolls of other less popular judges. It will be difficult to perceive how a separate table should be given for those birds of passage which we understand appear to have found a resting-place in the previous table of 735 cases. A third table is said to give the causes initiated in the Outer House in the year 1881, being in number 1590, making the gross causes before the Court, reckoning remanents, 2360. The final judgments within the year were 1263, and taken out of Court otherwise than by final judgments 342, and thus disposed of within the year 1605. Still another table is set apart for the long array of 644 cases in dependence at the close of the year, which, of course, is a mere repetition of a former table. A table sets forth the *nature* of the final judgments given within the year, which also appeared already in the first quinquennial table of the business of the Courts, with the addition of their distribution amongst the mysterious letters denoting the clerks or closet keepers. This is carried out by several additional tables of no earthly importance, and is simply "*statistics run mad*." There can be no importance whether the final judgments were on a "*summons*," or a "*petition*," or a "*writ*," or "*with or without a closed record*," or "*what was the number of interlocutors before final judgment*," or the "*number of pleadings and other documents, exclusive of productions*." Here it may be questioned, Can a *document* or a *production* be held to be classified with *pleadings*? Nor is it told whether the pleadings were oral or in writing. Still more astonishing is it to learn that verdicts of juries may be "*on the merits of a whole cause*," and others "*on casual issue*," or "*otherwise on the merits or casual issue*." As might be expected, the last two columns, set apart to receive the last two nondescripts, receive not a single entry. A tell-tale table details the "*number of weeks elapsing between closing record and*

pronouncing judgment." 21 columns are set apart for this "timetable," but the names of the judges are kept *sub umbra*, and only the alphabets of their officials set forth. Of 522 cases falling under this table, 41 received their doom within one week, 33 were five weeks at avizandum or "*hatching*," 49 were in suspense from 15 to twenty weeks, 46 from 20 to 25, 75 from 25 to 50, 37 from 50 to 100, 7 from 100 to 150, and 3 from 150 to 200 weeks. A column is added for "*above 200*," that being supposed the highest latitude for a judge to nurse or mature his mind for judgment. It is pleasant to perceive that not one case is to be found in this *ultimatum* column.

A table is set forth for analysis of final judgments in processes initiated by petition, or writ, or summons during session, and gives 230 cases, in which 185 answers were lodged or appearance entered, of which in 168 the petitions were granted, and 15 were refused, and 2 under the strange title of "otherwise"! Where no opposition was made 44 were granted, and 1 refused, and none was "otherwise" disposed of. Six columns are set apart for cases disposed of after "reports by men of business and skill—accountants of Court, other accountants—reported to Inner House by interlocutor and note, or verbally to the First Division or the Second Division," all which six columns remain empty! Still another table is added, seemingly identical with the preceding, with sixteen columns, all of which are empty! A table is set apart for "petitions before the Junior Lord Ordinary for the period from 31st December 1880 to 31st December 1881." This table has no less than fifteen columns with distinct headings, but only one records the solitary fact that J. S. has had 33 such petitions in dependence under his charge, but all the other inquiries are answered with the curt answer "*No information*," but whether J. S. is to blame for this taciturnity is not said. Another table reports petitions initiated within the year. J. S. again is reported as having 496 cast on his care, which with the remanents make a gross total of 529. It is noticed that 468 final judgments were given within the year, and 7 were taken out of Court "otherwise than by final judgment." Under this department another table is given of 54 petitions still before the Junior Lord Ordinary; their ages are sought to be ascertained by sixteen columns. It appears that the oldest inhabitant dates from 1852, and thus has been beating at the door of justice for thirty years; twelve years of one; two remain alive from 1880, and 40 date their existence from 1881. Three other tables remain, but which are of no practical use. This will appear when it is stated that in the first table seven columns remain blank, in the second table twelve are similarly void, and the last table remains wholly blank, with the apologetic "*No information*," similar to the usual placard, "No road this way." We thus leave the territory of the Outer House, and now venture on the more august sphere of the Inner Chamber of Justice.

Passing from the outer region of the "Temple of Justice," we now are led into the Inner Houses. The first table we find to be inscribed "Proceedings in *each* Division of the Inner House." The first section, termed "general balance," includes *both* Inner Houses. There appears from this table to have been in the year 1881 of total causes 133 in dependence at the commencement of the year, of which the First Division claimed 93 and the Second only 40. By reclaiming note 32 were admitted to the First Division, and 18 to the Second; by petitions 13 obtained a hearing from the Judges of the First, and 11 from those of the Second Division; 27 came before the First Division by appeals from inferior (that is, *local*) Judges, and 10 were heard by the Second Division; 22 were admitted by "other writ," and only one of these was on the roll of the Second Division. A table is given for the number initiated in each year, beginning with the eldest. Columns are given from 1875 to 1880—the first two are unoccupied, one appears under the year 1877, another in 1878, ten under the year 1879, and 121 in the year 1880.

A second table is intended for causes transferred from one *Court* to another (meaning *Division*), but the whole tables are in solitary blank, giving the impression that no such translation was enacted, though certainly from the state of the rolls such appeared imperatively required. Another table states causes initiated within the year 1881. There were 833, of which 546 went to the First and the remainder to the Second Division. Of these, 288 were by reclaiming notes, 219 by appeals, 184 by petitions, 142 by "other writ," making 966 gross cases before the Divisions, with 133 causes in dependence at the commencement of the year. In 966 distributed in like proportions before the Divisions, 121 cases during the year were transferred from the First Division to the Second, 576 final judgments were given within the year 1881, and 95 cases were "taken out of Court *otherwise* than by final judgment." Another table repeats a former one as to the "oldest inhabitant," which still lingers since the year 1878. Of the growth of the year 1879, the *ten* which appeared at the commencement of 1880 were reduced to *two*, and 121 at the commencement of 1881 were reduced to 32. But of those which came into existence during the year 1881 there still survived 139 at its close, leaving a gross total made up from former years of 174 still in dependence.

Another table records the total judgments within the year 1881. There were 576. Pursuers obtained judgments in 347 cases, with costs in 146, without costs in 181, costs from "common fund" in 3 cases, and "costs otherwise disposed of" in 17 cases. The defenders had 200 judgments in their favour—162 with costs, 32 without costs, 1 from a "common fund," and 5 cases costs "otherwise disposed of." 29 "mixed judgments" were given; in 5 the pursuer obtained costs, and in 9 the defender had costs, 3 had costs from a "common fund," and 12 were otherwise disposed of. 6

cases which had originated in 1879 were disposed of in 1881, 83 in 1880, and 487 in 1881. Of interlocutors there were 871, and 1308 were the "number of pleadings and other documents, exclusive of productions given in by parties." (As formerly noticed, this is as anomalous an enumeration as it is useless.) Of judgments, 9 were on verdicts and 567 without verdicts. Of verdicts, 8 were on "merits of whole cause," none "on *casual* issue," and 1 "*otherwise* than on merits or casual issue." 5 verdicts were given for pursuer, 4 for defender, and there were no mixed verdicts. The verdicts appear to be all from issues from the First Division. Of 188 cases brought from the Outer House on judgments, 125 were adhered to, 1 repeated, but grounds of decision altered; 49 were reversed, and 13 "partially adhered to and partially reversed." There follows an interesting table of the fate of the judgments of the several Lord Ordinaries when submitted to the Lords of the Inner Chambers:—

Lord Craighill had 4 judgments adhered to, and 1 reversed.

Lord Curriehill had 34 adhered to, 7 reversed, and 3 partially adhered to and partially reversed.

Lord Rutherford Clark had 42 adhered to, 9 reversed, and 3 mixed judgments.

Lord Adam had 14 adhered to, 1 on different grounds, 12 reversed, and 2 mixed judgments.

Lord Lee had 12 adhered to, 9 reversed, and 3 mixed judgments.

Lord Fraser had 8 adhered to, 6 reversed, and 1 mixed judgment.

Lord M'Laren had 2 adhered to, 3 reversed, and 1 mixed judgment.

The Lord Ordinary on Bills had 9 adhered to and 2 reversed.

There was only 1 case heard and decided under section 59 of the Court of Session Act, 1868, from the First Division of the Court; 2 from the same Division under section 60 of the same Act. Ten registration appeals were heard by Lords Mure, Craighill, and Fraser. There were no election petitions within the year 1881. 9 cases were on the poor's roll at the commencement of the year, 32 were put on during the year, making 41 in the luxury of the "green table." There is no record of the cases which have been *refused* to sue *in forma pauperis*, which would have been of interest to learn. It is somewhat unfortunate to find in this corner of the tables columns set apart for information to be got from the Second Division filled with somewhat negative response, "*no record*," "*not known*."

SHERIFF COURTS.

The report, after exhausting the statistics of the Court of Session in the two Divisions of the Inner House and the Outer House, proceeds to the statistics of the Inferior or Local Courts. The first of the series are the Sheriff Courts in their different departments. The first in order is the Ordinary Court of the Sheriffs. The first table is "retrospective," being a comparative table of the business

in the Sheriffs' Ordinary Courts in the years 1877, 1878, 1879, 1880, and 1881 :—

	1877.	1878.	1879.	1880.	1881.
I. Number of causes within the year—					
1. Causes in dependence at commencement of year	1,821	1,500	1,534	1,515	1,498
2. Causes initiated within the year	7,902	8,734	9,724	9,053	8,578
Total	9,723	10,234	11,258	10,568	10,076
II. Character of causes—					
1. On process initiated by summons	1,033	...	...	...	...
2. On process initiated by petition or otherwise than by summons	8,690	10,234	11,258	10,568	10,076
Total	9,723	10,234	11,258	10,568	10,076
<i>Note.</i> —At 1877, the summons being abolished, all causes were afterwards initiated by petition, hence a very unnecessary reiteration has been introduced by succeeding columns, which of course are all void.					
III. Disposal of causes—					
1. Final judgments within the year	7,109	7,759	8,580	7,856	7,453
2. Causes taken out of Court otherwise than by final judgments	1,114	941	1,162	1,215	1,175
3. Causes in dependence at the end of the year	1,500	1,534	1,516	1,497	1,448
Total	9,723	10,234	11,258	10,568	10,076
IV. Disposal of <i>final</i> judgments—					
1. By decrees <i>in foro</i>	3,272	3,479	3,510	3,361	3,356
2. By decrees in absence	3,837	4,280	5,070	4,495	4,097
Total	7,109	7,759	8,580	7,856	7,453
<i>Note.</i> —A decree in absence cannot be called “a <i>final</i> judgment.”					
V. Judgments <i>in foro</i> —					
1. By Sheriff	34	46	51	38	51
2. By Sheriff on appeal	1,249	1,185	1,126	951	941
3. By Sheriff-Substitute	1,989	2,248	2,333	2,372	2,364
Total	3,272	3,479	3,510	3,361	3,356
VI. Causes concluded by Sheriff—					
1. By Sheriff on appeal	1,249	1,185	1,126	951	941
2. Directly by Sheriff	34	46	51	38	51
Total	1,283	1,231	1,177	989	992
<i>Note.</i> —The last section is clearly a repetition of a previous one.					
VII. 1. Result of appeals sustained	937	919	841	722	734
<i>Note.</i> —Meaning “ <i>affirmed</i> ,” for the appeal was “ <i>not sustained</i> .”					
2. Reversed	179	162	158	141	132
3. Mixed judgments	133	104	127	88	75
Total	1,249	1,185	1,126	951	941

	1877.	1878.	1879.	1880.	1881.
VIII. Analysis of causes decided by decree <i>in foro</i> as regards costs—					
1. Causes where costs not taxed or otherwise fixed . . .	682	707	761	738	764
2. Causes where costs refused to both parties . . .	940	986	956	953	862
3. Causes where amount of costs entered in process . . .	1,650	1,786	1,793	1,670	1,730
Total . . .	3,272	3,479	3,510	3,361	3,356
Sum total of costs entered in process . . .	£23,295	£23,737	£25,826	£25,634	£26,863

Note.—The fractions of pounds, given in the report, are here omitted. The amount of costs awarded is given, but a much more useful table might have been given as to the gross sums sued for in the Sheriffs' Ordinary Courts, and with less difficulty in collecting than mere costs.

IX. Miscellaneous and administrative business—

1. Applications, etc., under Bankrupt Act	3,129	4,184	5,666	3,631	2,581
2. Do. do. Poor Law Acts	913	843	800	806	601
3. Do. do. Lunacy Acts .	2,320	2,282	2,223	2,414	2,584
4. Do. do. Registration of Births .	879	795	775	772	846
5. Do. do. Education Act, 1872 . .	473	554	468	668	690
6. Do. do. Master and Servant Act .	...	...	...	...	...
7. Petitions for admission, suspension, etc., of Sheriff-Officers . . .	42	40	64	70	41
8. Do. for service of heirs .	631	575	551	533	532
9. Appointments of tutors or curators to minors . .	36	36	40	27	25
10. Applications by prisoners for aliment . . .	122	137	143	139	34
11. Do. under Sanitary Act .	100	84	57	82	74
12. Do. under Shipping Act .	36	42	27	29	28
13. Do. for <i>fugæ</i> warrants .	61	84	104	92	100
14. Do. for lawburrows . .	18	12	27	13	12
15. Do. for admission to poor roll . . .	1,429	1,625	1,859	1,754	1,792
16. Decrees in absence from Ordinary Court? . . .	3,837	4,280	5,070	4,495	4,097
17. Miscellaneous applications .	1,766	1,988	2,318	2,533	2,212
Total . . .	15,792	17,561	20,192	18,058	16,249

Note.—A column is added in this and other previous tables giving the quinquennial average, which appears to serve no practical purpose.

APPLICATIONS FOR CESSIO BONORUM.

	1877.	1878.	1879.	1880.	1881.
Number of applications . . .	307	442	530	469	339
1. In dependence at commencement of the year . . .	25	50	67	75	23
2. Entered within the year . . .	228	392	463	394	316
How disposed of—					
1. By extracted protection or decree for pursuer * . . .	187	292	337	305	179
2. Otherwise removed out of Court . .	70	83	118	141	115
3. In dependence at end of year . . .	50	67	75	23	45

* *Note.*—This supposes the insolvent to be *always* the petitioner, but now that a creditor is more generally such, this title is no longer applicable.

A table is titled "Causes initiated prior to and in dependence at commencement of the year 1881." It is designed to catch the date of the "oldest inhabitant" in Sheriff Courts. The net is constructed to catch all causes from the year 1868 to 1880, and is spread over the 55 Sheriff Courts. But for the credit of Sheriff Courts, the first three columns remain without a single captive, and therefore appear to be a very unsuccessful fishing. The oldest inhabitant is assigned to Aberdeen, and was born on 29th January 1873. The next is to the debit of Jedburgh, and came into existence on 27th November 1874. Rothesay claimed a case which dated its birth from 27th October 1875. Another is assigned to Aberdeen in 1876, two in 1877, and other two in 1878. Under that year, 15 in all were pending, and 198, which brought in the year 1879, were handed over to the following year, and 1278 initiated in 1880 were in like manner transmitted to 1881. In the year 1881 there were 8578 causes initiated in the 55 Sheriff Courts, 10,076 were in dependence, and there remained in dependence at the end of the year 1448 causes. The following are the Sheriff Courts which had upwards of 200 causes brought in 1881 before them :—To Glasgow were assigned 1767, to Edinburgh 1008, to Dundee 305, to Aberdeen 762, to Forfar 243, to Banff 265, to Perth 228, to Stirling 200. Thirty-three Sheriff Courts in the year 1881 had less than 100 cases, Cromarty had only 9, and one (Fort-William, in Argyllshire) had only 6.

Another table states that of 8628 cases ended within the year, 1175 were "dropped under section 49 of 39 and 40 Vict. c. 79, or otherwise taken out of Court;" 4097 received decree in absence, and 3356 by judgments *in foro*; 941 by Sheriff on appeal, and 51 by the Sheriff otherwise than on appeal; and 2364 were by judgments by Sheriff-Substitute. A table is given of the years of initiation of causes ended by judgment *in foro*. This appears to be a very unnecessary repetition of a former table already noticed.

A time or tell-tale table records the "time occupied by judgments of Sheriff-Substitutes in causes within the year." A net is spread consisting of twenty-five meshes, entitled "Number of weeks, *first* between date of Sheriff-Substitute's *possession* of *completed* process; and second, date of judgment." The utmost latitude apparently allowed to the Sheriff-Substitute for the stage of *arizandum* is 57 weeks; but that and the previous column remain blank, as many prior columns are in that vacant state, which seems to have been very unnecessarily spread, except to fill out the folio sheet. Of 3305 cases, 2886 judgments were given in one week and under, 256 in two weeks, 82 in three weeks, 36 in four weeks. The number of the judgments gradually decrease; and, as said, many of the columns denoting the lapse of time remain blank, only one appears to have 17 weeks for its hatching, and another consumed 28 weeks in the process of incubation, and both protracted cases appear under the Court of Selkirk. It does not.

appear whether the judgments were final or interlocutory. A separate table records the number of appeals from the Substitute to the Principal Sheriffs. Of 3356, in 2311 cases no appeal was taken, and in 1045 there were appeals, but whether from final or interlocutory judgments does not appear; there were 904 cases with but one appeal, two appeals in 123 cases, three appeals in 16 cases, four appeals in 1 case, and another five times passed in review before the Sheriff. There is another table for appeals. Of the 1207 appeals, 941 were "causes concluded by Sheriff-Substitutes by final judgments *in foro*," and 266 were "*casual* appeals." Of 992 causes decided by the Sheriff Principals, 51 were decided "directly," and 941 on appeal. In 149 of these "further papers were ordered" (supposed to be petitions and answers). Hearings were ordered in 785, and in 7 "neither papers nor hearing were ordered." Of 941, the *result* of appeals, it is reported that 734 were *sustained* (meaning that the appeals were *not* "sustained," but the judgments "affirmed"); 132 judgments or interlocutors were "reversed," and therefore the appeals were sustained; and 75 had "mixed judgments." Very equitably a tell-tale table is given of the diligence of the Sheriff in the performance of his duties. The net spread for the Substitutes extended to 57 weeks, but that for the Principal Sheriff has only 44 weeks extended for the performance of his judicial functions, but most of the columns remain blank. Of 941 causes the Sheriff disposed of 721 in "one week or under." This happy result appears in the Courts where the Sheriff is resident at the seat of Court. In Edinburgh, of the 116 appeals all were despatched within one week. In Glasgow, of 312 appeals 288 were despatched within the week—one was at avizandum for 15 weeks, belonging to Banff; two had 16 weeks' detention: one of these was attached to Ayr and the other to Portree. It appears that £26,863 were awarded in costs in 1730 cases, and in 862 causes costs were "refused to both parties."

A table is given for the Sheriff's miscellaneous and administrative business previously given, but now divided amongst the Sheriff Courts. The particular divisions formerly given are still more minutely subdivided—some Courts have no items of business under certain heads. As might be expected under the various heads of Bankruptcy, Glasgow had 890 items, Edinburgh 438, Aberdeen 175, and Dundee 102; and in the head of Poor Law, Glasgow under its various branches had 170 items, Edinburgh 186, Aberdeen 32, and Dundee only 5 cases under the Poor Law administration of the Sheriff—a most favourable account of the prosperity of that city and its district, and of the absence of pauperism. Under the 16,249 applications under the "miscellaneous and administrative business," the grand total—Glasgow shows 4293 cases, Edinburgh 1962, Aberdeen 1226, Dundee 651, and Ayr 515. All the others have more or less, but all below

500, and some to a trifling extent. Of 339 cases of Cessiones, Glasgow had 141 applications within the year, and Edinburgh 33. Under recent Debtors Acts, with the abolition of imprisonment for civil debtors, this department of business may be expected greatly to increase and supersede recourse to mercantile sequestrations.

NESTOR.

(To be continued.)

CIVIL PROCEDURE IN FRANCE

(Continued from vol. xxvi. p. 595.)

THE reader will have noticed that the classes of cases which are exempted from the preliminary process of conciliation are numerous and large. The exemption in cases requiring expedition is made use of very extensively. The plaintiff frequently asks for leave to *assigner à bref délai* (summon with short notice), and is very often successful. Then, again, the defendant need not appear to the summons *en conciliation*, and he frequently does not appear. In that case the plaintiff proceeds to serve the regular *exploit d'ajournement* or writ. Out of about 343,500 cases entered for trial in 1878 (including those in which conciliation was not obligatory as well as those in which it was), there were barely more than 50,000 summons *en conciliation*; to 24 per cent. of these the defendants did not appear, while in 34 per cent. of the cases where they did appear the conciliation was effective.

The *exploit d'ajournement* is in effect the same thing as our writ of summons, though it differs from it in form. It is delivered to the defendant either personally or otherwise by an *huissier*, who is an officer of the Tribunal. This officer is the mouthpiece for all formal communications between the two parties. The code of procedure is very precise as to what the *exploit* shall contain. It must be dated; it must contain the name, profession, and address of the plaintiff, the name of his *avoué* (solicitor), the name, address, and qualifications of the *huissier*, the name and address of the defendant, and it must mention the person with whom the copy of the *exploit* has actually been left, whether or not it be the defendant in person. There must be further contained in it a short statement of the nature of the claim, and of the legal redress sought, a proposal to try the case before a certain tribunal, and the day on which the defendant is to appear. "The whole under penalty of nullity," as the Code concisely puts it. The *huissier* must also state at the end of the *exploit* the cost of the same, and he must hand with it a certificate of the failure of conciliation (in cases where conciliation must be tried), or of the non-appearance of the defendant to the summons *en conciliation*, and copies of the documents, if any, or those parts thereof on which the claim is based. If the *huissier* cannot find at the defendant's residence either himself or any of

his family or servants, he may at once serve the *exploit* on a neighbour, who will sign it. If no neighbour will accept service, it must be served on the *maire* of the district. As an example of the strictness with which all these provisions are interpreted, we may mention that if the *huissier* served the *exploit* on the *maire* without stating on the same that no neighbour had been willing to accept it, it would be null and void. If the defendant has no abode in France, the *exploit* must be served on him at his actual place of residence. If that is not known, it must be posted up on the door of the tribunal before which the defendant is summoned; and a copy must be sent to the *Procureur de la République* (of whom something will be said later on). If the defendant is abroad or in French territory beyond the Continent, the *exploit* will be served on the *Procureur*, who will forward a copy to the Minister of Foreign Affairs in the first case, and to the Minister of Marine and the Colonies in the second.

The defendant is usually summoned to appear within eight days. This really means that within that period he must notify to the plaintiff's *avoué* (solicitor) that he has appointed an *avoué* who will act for him. The employment of a solicitor is obligatory in all cases before the *Tribunaux civils d'arrondissement* and the *Cours d'Appel*, even though the parties should argue their own cases—a very rare event in France. Before proceeding to the next step which leads us into Court, we will explain the method by which the cases are assigned to particular chambers. With regard to Paris, as was previously noticed, the *Tribunal Civil de la Seine* is divided into eleven chambers, of which the first seven are for civil cases. There are no strict rules as to the kinds of cases which the different chambers take; but as a fact there are at Paris certain chambers which generally take particular classes of cases. For instance, the fourth chamber has a *specialité* of judicial separations; the first chamber takes the great cases, especially those involving questions of legitimacy, the validity of marriages, and status generally. But there is no statutory assignment of cases as there is here.

To return: when the *exploit d'ajournement* has been served, the plaintiff's *avoué* goes to the *Greffe* (the registry) of the Tribunal (whether in Paris or in the provinces) with his *placet*, so called from the precatory form of the document, which reproduces the terms of the claim contained in the original writ. This *placet*, the defendant's defence, and the plaintiff's reply, are all in form petitions to the Court, containing what are called *motifs*, and conclusions. The *motifs* consist usually of statements of fact, each allegation being introduced by an *attendu que* or "considering that." They are documents of great neatness, couched in that elaborately precise legal language of which French judgments afford so good an example. At the *Greffe* the *avoué* is given a number which ultimately determines the order in which his case will be put in the cause list.

With the number he goes to the President of the Tribunal, who assigns the case to a particular chamber, which he indicates on the *placet*. After this, if the defendant has appointed an *avoué*, the plaintiff's *avoué* may take the *placet* to the chamber to which the cause is assigned the day before the day of the week appointed for such purposes, having previously summoned the defendant by a summons called an *avenir*, and the next day the case will be called on in the chamber, and the defendant's *avoué* will deliver in Court his *conclusions* or defence. These *conclusions* are often in practice handed in the next day, and if further time is wanted it is easily obtained by delivering *conclusions exceptionnelles*, asking literally for further documents from the plaintiff, but really intended to procure an extra eight or fifteen days—to get the case postponed *à huitaine* or *à quinzaine*, according to the convenient French expression. When the defence has finally been delivered, the plaintiff has eight days to deliver his reply, if he wishes to deliver one. The case is then put *au rôle*, or into the list, and then it may remain at Paris for six or seven months perhaps, if it is assigned to one of the first three chambers, which are the most crowded. For the other chambers three months is an average length of time. As the cases are worked off, those waiting at the *Greffe* are called in the order of their entry there. They will, after the first call, be called on every eighth day from the day of the first call. The *avoué* or *avocat*, if he be already instructed, will attend on every eighth day to ask for the adjournment *à huitaine* or *à quinzaine*.

It is not until the case has been called the first time that the *avocat* is instructed. His brief, called a *dossier*, consists of all the necessary documents which would find their place in an English barrister's brief. There is, however, in strict parlance no such thing as a brief in France, for the *avocat* does not receive from the *avoué* any such narrative as is contained in the brief proper. He only receives the raw material. They form an unsightly and bewildering mass of disconnected papers of bath-post size. As our readers are for the most part aware, the French *avocat's* functions and privileges differ in no small degree from those of his English brother. The special pleader does not exist in France; it is not until all the pleading, which is, though carefully done, of but minor importance, is concluded that the conduct of the case passes into the hands of the *avocat*. He has, in most cases, nothing to do but to argue in Court, to *plaider*, as the French say. He will, if it be necessary, advise some new step in procedure, which the *avoué* will take, and may draw any necessary documents himself, or sketch them, but that is exceptional. He has the exclusive right of audience in the civil chambers of the *Tribunaux d'arrondissement*—the ordinary civil Courts—the *Cours d'Appel*, and the *Cour de Cassation*, to which a special number of *avocats* are attached. It is extremely unusual for more than one *avocat* to appear for each party. The case is opened by the plaintiff's *avocat*, and his adversary, his

honorable contradicteur (the French equivalent for "learned friend"), replies at once. As no oral evidence is ever offered, and there is no jury, in civil cases the proceedings are shorter than they are in England. It is true that in a great many cases the *Procureur de la République*, or rather his *substitut*, will offer some remarks, but they are usually brief. The speeches of counsel, especially in the more important cases, are clear and concise, and remarkable for their sober elegance. To speak *utilement*, that is, without surplusage and repetitions, is the ideal of the serious French *avocat*. The natural precision of language and elegance of diction which belong to all Frenchmen are found in perfection among French counsel. It is true that this neatness of address is conduced to by the condition of French law and the habits of French judges. A legal argument in an English Court is a perpetual citation of cases; besides being carried on in the form of a discussion between the advocate and the bench. To the uninitiated an argument in our Court of Appeal, where counsel has to hold his own very often against the crossfires of three judges, is almost unintelligible. In France comparatively few cases are cited, and then only by name. The argument is based on principles to a much greater extent than is usual with us. Reference will continually be made to the works of text-writers, and to the debates in Parliament when a law which is being applied in Court was before the House. Then the course of the advocate is smoothed by the fact that the bench never interrupts him. Such a thing as a discussion between the judge and counsel was never seen in the Palais de Justice. The *avocat* "speaks his piece," and sits down. When the bench does speak it is through its President; it is not etiquette for any other judge to speak. Though the best *avocats* speak considerably better, in a less loose and conversational manner, than their English brethren, yet the less gifted of them have an intolerable habit of screaming, and after a speech on an unexciting question, as to the proper notice of dishonour of a bill of exchange, for instance, one of these gentlemen will sink back into his seat utterly exhausted. The Court will but seldom deliver judgment immediately after the conclusion of the arguments. It will be delivered the next day, or in two, three, or even eight days. The elaborate form of a French judgment makes it somewhat more difficult to formulate than the judgment of an English Court. It is delivered, however, at the conclusion of the arguments in very unimportant cases, but always in the form prescribed by law; and it is always the unanimous judgment of the Court, and is delivered by the President. If the arguments are not concluded at the close of the sitting (which lasts from twelve to four, with half an hour's suspension at two!) they are resumed in eight days. We have considered up till now a simple case which has run quite smoothly. In our next article we shall deal with interlocutory and collateral proceedings.—*Law Times*.

(To be continued.)

NOTES IN THE INNER HOUSE.

WE note two cases relating to bankruptcy. In *Orr, Petitioner* (Oct. 19, 1882, Second Division), the usual deliverance had been pronounced directing a meeting of creditors upon the application of the petitioner who held a mandate from the insolvent. It was discovered that he had been drowned prior to the date of this deliverance. A petition was presented to the Court of Session craving a confirmation of the Sheriff's order, and all that followed thereon; but the Court refused to grant it, upon the ground that the death of the insolvent had rendered these proceedings null and void. The case of *Gillon, Petitioner* (Nov. 1, 1882, First Division), is important as illustrating the kind of averments upon which a petition for the recall of sequestration should proceed. The estates of one Murphy had been sequestrated upon 7th August 1882 on the application of the bankrupt and a concurring creditor, who founded upon certain promissory notes. In October another creditor presented a petition for recall, stating various objections to these notes. It was said that they had been granted without consideration; that they were written out on the same date, and concocted for the purpose of effecting this sequestration. To this petition answers were lodged by the trustee, denying the averments made in it, and maintaining that there was no relevant case for proof, the petitioner being bound to condescend on his means of knowledge as to the alleged fraud.

In giving judgment, the Lord President, referring to the petitioner's averment, remarked, "It is a question of great practical importance whether that is an allegation which ought to be sent to proof." He held it was not. "It is too vague and general to justify the Court in interfering with a pending sequestration, and there would require to be something more explicit than a statement like this. The petitioner would require to state what were his means of knowledge of the alleged fact that there was something wrong, and to show in what manner he would establish that the debt was not due. . . . Where the debt of the concurring creditor is sworn to by a regular affidavit, and is accompanied by appropriate vouchers, then, unless there is something irregular on the face of the claim, or of the vouchers, such an averment as this will not afford a relevant ground of recall. This case may be compared with that of *Campbell v. Myles* (15 D. 685), where a sequestration was recalled, the concurring creditor being a bank agent, while the document of debt, a bill, was specially endorsed to the bank, and he was not one of the officers entitled under statute to swear an affidavit on behalf of the bank. In that case it will be observed the objection arose *ex facie* of the documents produced."

Rankin v. The Caledonian Railway Company, Nov. 1, 1882, Second Division, is an illustration of the effect of retention viewed

as a bar to the rejection of goods sold. A horse had been sold under an express warranty of soundness. It was discovered to be unsound, and intimation made to the seller. He requested the purchaser to keep the animal until it had recovered from a cold, which rendered it difficult to ascertain its real condition. The purchaser kept it for several weeks, and it was subsequently sold by warrant of the Sheriff. When an action was brought for repetition of the price, the plea was taken by the defender that the retention of the animal operated as a bar to its subsequent rejection. But this plea the Court would not sustain, although fully recognising the soundness of the law laid down in *M'Vey v. Gardner*. Upon the doctrine of rejection the following clear statement was made by Lord Young: "The law is this: if the purchaser of a horse or anything else objects to what is sent to him by the seller in implement of the contract of sale,—objects to it as not according to bargain,—his duty is to intimate his rejection timeously, for that is only fair to the seller. What is timeous intimation is a case of circumstances in individual cases, and the nature of the article sold, and the character of the objections, and the possibility or probability of discovering them, must all be taken into account; but there must be timeous intimation of the rejection of the article as not according to contract, as otherwise there will be no remedy, and the article must be accepted as according to contract. . . . Now, in regard to the law about neutral custody, the expression neutral custody enters into the opinions of the judge in that case (*M'Vey's*) more than once, but I think the matter of neutral custody is itself one of circumstances. It is admitted to be so here. So far as the character or class of the goods is concerned, neutral custody would not be required in the case of plate, pictures, or books. It might be in the case of wines. But on the whole it is, I am of opinion, a question of circumstances, more having to be regarded than merely the nature of the article. If a dealer sent a horse to the Duke of Buccleuch's stables at Dalkeith, and if a rejection of the horse as being unsound is intimated to him, and he say, 'Well, the horse is as likely to be well taken care of there, and certainly more economically for me in the event of my proving to be in the wrong, and I do not object to its being there,' his merely not objecting might be enough; but if the circumstances were such as to show that that was the understanding of the parties, and that they both assented to it, I should hold the question of neutral custody to be at an end in any case." The number of cases of divorce on the ground of desertion has recently been considerable. We note two, viz. *Kinnear v. Kinnear*, Nov. 3, 1882, Second Division, and *Barrie v. Barrie*, Nov. 23, 1882, First Division. The former case raised merely a question of fact, whether the wife's desertion had been rendered necessary by her husband's cruelty. The Court (Lord Young with some doubts) repelled the defence set up by her, and granted decree. In the other case decree was refused because,

from the whole circumstances, it appeared that the parties had been really on friendly terms; that their separation partook rather of the nature of an agreement to live apart than of wilful desertion by the defender; and that the pursuer had never seriously pressed his wife to return to his house. "Wilful and malicious desertion is," said the Lord President, "there can be no doubt, a flagrant violation of conjugal duty, and such a violation thereof that every form of judicature provides some redress; but the law of Scotland alone provides the remedy of divorce—a remedy which is unknown in the other parts of the United Kingdom of the Queen's dominion, and which must not be stretched beyond its legitimate bounds, seeing that it is a statutory remedy. In order to come up to the requirement of wilful desertion in the name of the statutes, it is essential that one of the spouses must withdraw from the other's society without any reasonable cause, and must continue that desertion maliciously. Without attaching too strong a meaning to the words, I may repeat what I had occasion to observe in the case of *Chalmers*, reported in 6 Macpherson 547, that nothing but wilful desertion, persisted in notwithstanding remonstrance, is sufficient to found an action of divorce." The case of *Kinnear* may serve as an illustration of what the Court will refuse to consider a reasonable cause.

Macdonald & Fraser v. Henderson, Nov. 3, 1882, Second Division, is a case of some importance relating to sales by auction. The question here was whether certain conditions of sale were to be held as forming part of the contract between the purchaser of a horse and the auctioneer. They had been posted up in conspicuous places in the saleroom, and in the catalogue reference was made to these *conditions*. The effect of the condition which led to the action was to free the auctioneer from any responsibility arising from the unsoundness of the animal sold. The Court decided the case in favour of the auctioneer. The Lord Justice-Clerk compared it with the decision in *Stevenson v. The Steam Packet Company* (2 Ret. H. of L. 71), in which it was held, "that special conditions limiting the common-law liability of a carrier were not imported into a contract of carriage by merely printing them on the back of the ticket delivered by the carrier in exchange for the fare."

In the case of *Nicholson v. Bust & Paterson*, Nov. 7, 1882, First Division, the circumstances were these: Paterson became cautioner for the due payment to the pursuers of sums collected by one of their travellers, who had entered into an engagement for three years; for the cautioning obligation there was no reference to any limitation of time. At the end of the three years another engagement was entered into between the traveller and his employers for a second period of similar duration. It was held (reversing the Lord Ordinary Adam) that the cautioner was liable for intrusions which had taken place during these latter years. The Lord President said, in giving judgment, "I cannot agree with the

law laid down by the Lord Ordinary. Whenever a cautioner is party to the original agreement,—that is to say, when the obligation of the cautioner forms part of the contract between the parties,—then the cautioner is entitled to rely on the conditions contained in it, and to see them carried out. But when there is a simple cautioning obligation, separate in itself, and not making reference to any specific agreement, then the same rule of law does not apply.” It was further held that the fact of the pursuers having made advances to the traveller to enable him to make good defalcations, and taking bills payable at sight, did not free his cautioner.

We note two cases under the recent Employers Liability Act of 1880. In the first of these (*Morrison v. Baird & Company*, Nov. 10, 1882, Second Division), the pursuer, the widow of a workman who had been killed, brought the action to the Court of Session from the Sheriff Court under section 6 of the Act, when it was pleaded by the defenders, that the fact of her having done so inferred the abandonment of the action, in so far as it was not laid upon the statute, but at common law. She had taken alternative pleas, maintaining that either her husband's death had been caused by the negligence of the defenders, which gave her a right to reparation at common law, or otherwise by the negligence of persons in the service of the defenders who had superintendence entrusted to them, thus bringing her case under the statute. The Lord Ordinary (Lee) repelled the defenders' plea, holding that the words of the 6th section, “any action under this Act,” include an action at the common law of Scotland as amended by the Act. “To hold,” he says, “that the statute in its 6th section was not intended to enable either party to remove such an action as a whole to the Court of Session, it is necessary to suppose that the ground of action under the statute is entirely distinct from and exclusive of an action at common law. I think, according to the true meaning of the statute, the ground of action is in every case fault, and that the statute is only required and pleaded to the effect of meeting a defence that in certain cases the employer is not responsible for the fault.” The Lord Ordinary's view was accepted as the sound one by the Inner House. The Lord Justice-Clerk said, “I cannot conceive that the Legislature ever intended that there should be a common-law action and a separate statutory action as well.” There was not, according to his opinion, two actions, but only one. Lord Young pointed out, “that the difficulty had always been to determine who is a collaborateur, and that it would be a very grave misfortune if a party could not so prove his action as to entitle him to the remedy which the common law would give him if the relation of collaborateur did not subsist between him and the person to whose negligence it shall appear on the facts that the accident was attributable, and also entitle him to plead the statute if it should appear upon these facts that that

relation did exist, but nevertheless that the negligence was of a character such as the Act provided for."

In the other case (*Dailly v. Beattie & Sons*, July 8, 1882, Second Division), the action was brought to the Court of Session under the 40th section of the Judicature Act, and one issue was proposed, raising simply the question whether the pursuer had been injured through the fault of the defenders while in their employment. The defenders contended that there ought to be two issues, one relating to the common law and the other to the statute. But the Court approved of the issue as proposed by the pursuer, holding that it was quite fitted for the trial of the action, "which depended upon the application to the facts of the case of the common law as amended by statute."

Reviews.

Commentary on the Bills of Exchange Act, 1882. By W. D. THORBURN, Advocate. Edinburgh: Bell & Bradfute.

THE Bills of Exchange Act, 1882, is, as our readers are aware, an Act to codify the law relating to Bills of Exchange. It is the first attempt at codification that has passed the ordeal of Parliament, and its future history will be watched with keen interest. The arguments in favour of codification of the law are weighty, and have seemed conclusive to not a few able lawyers, and to a still greater number of legal theorists, without any practical experience in the administration of justice. The objections to a code are also very weighty, whether considered from a philosophical or a practical point of view. By most professional lawyers they are considered to preponderate. Common law has been always found more elastic than statutory law, and more easily adapted to the requirements of justice in exceptional circumstances. We have all met with cases of downright wrong justified by the hard words of a statute, and have wished that enterprising legislators would give up the notion that they can provide for every case—past, present, or future—in the strange medley of clauses that usually constitutes the modern Act of Parliament. It may be, however, that too little allowance is made for the difference between good legislative workmanship and bad. Perhaps it is owing to our having had an intolerable number of crude, ill-digested statutes of late years that we are becoming disgusted with all statutes. In any case, the advantages and disadvantages of a code can best be ascertained by trying codification of some special portion of the vast field of jurisprudence.

The Legislature has done well in selecting the law of Bills of Exchange as a first test of the merits of a code. It is a singularly

easy subject to codify; and if the result proves unsatisfactory, success need not be looked for elsewhere in the province of common law. Statutory law can, of course, readily be codified if nothing more is attempted than to consolidate the existing statutes on the subject; but we are not at present speaking of such unambitious though most useful legislation. For two reasons the selection of Bills of Exchange as a fit subject for codification seems to us happy. In the first place, the law of the subject lies within a comprehensively narrow compass, is fairly well settled, and does not vary seriously within the limits of the United Kingdom. In the second place, Bills of Exchange only interest men of common sense and practical sagacity. No member of Parliament has ever been called on by his constituents to explain a little of his views regarding them. The sentimental law-reformer passes by them with indifference, preferring to harass with his persistent attentions employers of labour, landed proprietors, heirs of entail, married women, undeceased wives' sisters, or unvaccinated infants.

The object of the Act is, speaking generally, to preserve the law as it is at present, but to declare the law authoritatively through the language of an Act of Parliament instead of leaving it to stand on the authority of the text-writers or of the decisions of our Courts. Some points hitherto considered doubtful are, or are intended to be, settled. A few minor alterations are made in the law, chiefly necessitated by the assimilation of the laws of England and Scotland. The Legislature intended to introduce no striking novelty or startling change by this Act. But it undertakes to tell us what the law is that we have been practising for centuries past, and it remains for us to find out by experience whether it has done so successfully.

The Act consists of the symmetrical number of one hundred sections. The language, being that of exposition rather than of enactment, differs considerably from what is usual in statutes, but is clear and succinct, though we must protest against such broken English as "the then capacity of the drawer" in section 54. Throughout, the Act bears evidence of great care and ability on the part of the draftsman of the Bill, and, what is more remarkable, of the careful assimilation of all subsequent amendments, so that they fit in harmoniously in their proper places in the Act.

The imaginative practitioner may resent this harmony of the different clauses. Finding his brain reeling in the vain effort to understand many a clause in other recent statutes, he has sometimes given up trying to guess their meaning, and indulged himself with fantastic speculations as to their origin. In one incoherent and discordant clause he fancies he reads the struggles of some unusually energetic victim to divert the car of the legislative Juggernaut from off his own on to his neighbour's neck. Another similarly mysterious clause he believes to be merely a tribute of love, favour, or affection from some provincial admirer of the

Government, anxious to add his little stone to the monumental pile. No clause in this Act has so much idiosyncrasy or mystery in its appearance as to justify any such speculations. The Act is workmanlike from beginning to end; and if it fail to answer the expectations of its promoters, it will not, we think, be from any want of care or ability either in its preparation or in its subsequent elaboration.

As a necessary consequence of an imperial code of law on the subject, the statute assimilates the laws of England and Scotland as to Bills of Exchange in so far as legal principle is concerned. The single exception, apparently, is that in Scotland, as heretofore, where a drawee of a bill has in his hands funds available for its payment, the bill operates as an assignment of the sum therein contained from the date of payment. In England a bill has no such effect, either at common law or under this statute. In other respects the legal doctrine is now the same in the two countries,—our law in some cases being now made the law of England, and English law being in other instances now introduced to Scotland. The changes, however, are slight in either case. The Scottish law as to summary diligence is preserved intact under the Act. But an important change in our judicial procedure is introduced by the last section, which makes any fact relating to a bill of exchange, bank cheque, or promissory note, which is relevant to any question of liability thereon, proveable by parole evidence. A change in this direction had long been considered advisable by the majority of lawyers.

On the whole, the Act has been welcomed by the legal public as a promising attempt to solve a problem of great interest, viz., Is it better to take our legal doctrine from a statute, or from our decided cases and trusted institutional writers? It is impossible to read this Act without seeing that it will need plenty of interpretation; and some time must elapse before we know whether this codification will not raise more questions than it will settle. At first sight, it will appear to many lawyers that it will need as careful an examination of our ordinary sources of legal information to arrive at a satisfactory interpretation of the code, as would have been necessary to ascertain the sound law of any particular case prior to the passing of the Act. If it be so, the code is merely an additional element of complication, with the risk superadded of an occasional blunder on the part of its compilers. Nor will it be a sufficient justification of the Act that it may be more handy for the information of the non-legal public who are interested in the matter. It is scarcely the duty of the Legislature to disseminate useful information; and we know no legal subject on which it would be possible to do so without misleading the public, though Bills of Exchange are perhaps the safest field for attempting so paternal a folly. But the Act has our best wishes for its success; and if it succeeds after reasonable trial, we should be glad to see it

followed by similar Acts on other branches of the law, such as Insolvency and Bankruptcy, though the difficulties of framing a satisfactory code on such a subject would be immensely greater. Meanwhile, though many questions under the new statute are looming in the distance, the only one that we have yet observed to have been brought under the notice of the public relates to the 94th section. That section makes it competent for a householder to attest the dishonour of a bill if there be no notary in the place. As the 98th section provides that nothing in the Act is in any way to alter or affect the law and practice of Scotland in regard to summary diligence, the officials at the Register House conceived it to be their duty to refuse to record a protest granted by a householder. The matter having been brought by the agents in the case under the notice of the Lord Advocate, the officials in question, in accordance with an opinion expressed by him, have departed from their objections, and we understand such protests are now duly recorded. The question will probably be raised in the Supreme Court sooner or later, but has no bearing on the merits or demerits of the Act as an instalment of an impaired code.

It would have been matter for serious regret if this unique statute had failed to find an annotator worthy of it. Annotated editions of Acts of Parliament appearing shortly after the passing of the Acts are apt to be little more than indexes to them, more or less imperfect or perfect as the case may be. They are essentially ephemeral productions; and though not wholly useless, are seldom worthy of serious criticism. There are exceptions, however, to every rule. We never remember to have seen a commentary published shortly after the passing of a statute so comprehensive and satisfactory as Mr. Thorburn's work on this important Act of Parliament. The book is replete with information on the very extensive subject-matter of the Act, and could only have been written by an author possessing an intimate and accurate knowledge of this branch of the law. It evinces both conspicuous ability and painstaking industry. The bulk of the volume consists of notes on the sections of the Act. We cannot recommend any reader to commence a study of the Act without the aid of Mr. Thorburn's notes. Though the language of the statute is sufficiently precise, cross references to previous or subsequent sections are perpetually necessary, and it involves a serious expenditure of time to hunt them up through the one hundred sections. Indeed, it is hardly possible to read intelligently a single section without either carrying in one's mind the greater part of the remaining ninety-nine, or having at hand at the foot of each section, as Mr. Thorburn has here given us, a trustworthy explanation of the relative provisions of other clauses of the statute. We have found the necessary cross references given by Mr. Thorburn with fulness and minute accuracy. These notes will therefore be found invaluable.

able both by lawyers and laymen. But for the more especial benefit of lawyers, the author has made copious reference in the notes to the decisions of the Courts both in England and Scotland, "either as explanatory of the principle of common law now embodied in the statute, or as illustrative of the circumstances in which the principle was applied." The references seem to have been selected with great judgment, and frequently throw much light on the words of the Act. No doubt these decisions are in a sense superseded by the statute; but the decision and the statute will usually lay down the same doctrine, and the terse words of the latter may be scarcely intelligible without the help of the former. It may seem to some remarkable that so much citation of authority is needed to aid the reader in his use of the statute; but we are confident that Mr. Thorburn's labour has been judiciously expended in this direction. It is at least the safer side to err on till we have had some experience in working the Act. We may draw special attention to a long and valuable note on page 175 as to the law and practice of crossed cheques. In the introduction will be found an exhaustive statement of the law as to Letters of Credit. The appendix contains the statutes relating to Bills of Exchange, etc., still unrepealed, and some useful forms. We think the author has realized the hope expressed in the preface, that "persons interested in bills, cheques, and notes will find in this volume the requisite information regarding all matters directly affecting these important documents." Though the work is a legal treatise written for the use of lawyers, it will prove a boon not only to lawyers, but also to bankers and all others dealing in bills or cheques. We have no doubt that it will obtain, as it deserves, a wide circulation. It ought to be no less welcome in England than in Scotland. The learned author will, we expect, soon have an opportunity in his second edition of correcting any errors and supplying any defects observable in the present issue. A book prepared like the present to meet a pressing demand, must occasionally show traces of haste; but we have observed few of such, and only one defect that we need mention. The index is not up to the level of the rest of the volume, and here and there is, we think, decidedly imperfect. This is a blemish, but we have no doubt it will be remedied in the next edition.

Styles of Writs in the Sheriff Courts of Scotland. By JAMES FORREST, B.A. Oxon., Advocate, and R. B. SHEARER, M.A. Glasgow, LL.B. Edin., Writer, Greenock. Pp. 510. Edinburgh: W. Green.

THIS is a new collection of Sheriff Court Styles. It differs from previous collections in the fact that it is the joint work of a procurator of the Inferior Court and a member of the Central Bar. We do not know if this is an ominous conjunction. It is

quite certain that the Sheriff Courts would be very much improved, if they were visited by Counsel more often than they are. The new system of intercalary Circuits was by some sanguine persons expected to excite a certain amount of civil business in connection with Circuit. So far that expectation has not been realized, and it is difficult to see how it can be realized without some important changes in the law defining the jurisdiction of judges upon Circuit. In the meantime, partly from the retention of the double sheriffship and partly from their own stay-at-home habits, the Central Bar have probably not enough to do. We are quite alive to the importance of encouraging the formation of cultivated and independent local Bars in the chief centres of population in the country. Legal institutions must to a certain extent follow the flow of population; and it cannot be denied that it is becoming more and more difficult to retain the entire machinery of the Supreme Civil Court at some distance from the true centre of population in Scotland. But no civilised country has yet contrived to dispense with the services of a powerful Central Bar any more than with those of a powerful Supreme Court. It is therefore no doubt a very proper thing that an advocate should assist in producing this collection of Procedure Styles in the Inferior Court.

The collection is the largest yet published of its kind, and reminds one of that long delayed volume, the third volume of the *Juridical Styles*. It gives 20 forms of Commissary Petitions, 42 forms of Bankruptcy Petitions, 29 forms of Maritime Petitions, 50 forms of petitions relating to heritage, 13 forms of petitions relating to moveable succession, an adequate number relating to landlord and tenant, and a large number of miscellaneous forms. Altogether there are 265 forms. In 1859, the industrious Mr. Soutar of Crieff was able to collect only about 200, of which some are not available. There can be no doubt that the publication of this collection is justified by the numerous changes which have occurred in the law affecting, directly or indirectly, the jurisdiction of the Sheriff Court. That observation does not indeed apply with equal force to all parts of the book. As regards Commissary Practice, for instance, the book adds little or nothing to what appears in the appendix to Mr. Alexander's *Digest*, published in 1859. As regards Maritime Causes, Mr. Neill, a solicitor in Greenock, published in 1878 a useful collection of about 40 Styles, the result of long professional experience. Neill's book, however, is decidedly clumsy in form, and it is a great matter for busy practitioners to have all their Styles together in one book, which contains nothing but Styles. It is a mistake to interlard a treatise with occasional Styles, or to overlay Styles with learned notes, and these errors have certainly been avoided in the present collection. Minute criticism of such a book is, of course, impossible. Its virtues and vices can be appreciated only after some years of extensive use by the profession. What appears at first sight is that the book is clearly

printed and well arranged ; and we have not been able to discover any serious errors or omissions. Perhaps, in some cases, the condescendence annexed to the petition extends to unnecessary length, but this is probably from a desire to keep near forms that have actually been submitted to the Court. Under Commissary Practice, looking to the case of *Muir* (4 Ret. 74), it might have been desirable to insert a form to meet the case where two parties entitled to the office of executor in different characters petition for a joint appointment. As a mere matter of consistency in form also, it would be desirable, where a legatee petitions for the office, to state that the next of kin do not claim the office. As regards Maritime Causes, owing to the existence down to 1830 of a separate High Court of Admiralty in Scotland, there has always been a considerable supply of well-known Styles in use. These are contained in Boyd's *Proceedings* (1808) and Smith's *Practice* (1830). Mr. Smith was one of the last Proctors of the High Court, and in a few gloomy observations in his Preface he bequeaths his book as a sort of legacy to the practitioners in the Sheriff Courts to serve as an introduction to a species of practice "to which they have been hitherto almost total strangers." To some extent these old Styles are still available; but the present collection, including, as it does, many of the remedies provided by the Merchant Shipping Acts, cannot fail to be of use. The Bankruptcy Petitions seem to include a greater variety of sequestration forms than the appendix to Mr. Murdoch's well-known Manual; and new cessio forms are given, such as recent Glasgow legislation has made necessary. The result of that legislation is shown in a note appended by the Editors to the form of petition for the benefit of *cessio bonorum*:—

"*Note.*—This petition can now be of use only, if at all, in the case of debtors for rates." The statement is perhaps not strictly accurate, but it shows the tendency of the Debtors (Scotland) Act, 1880, which in our opinion was quite unjustified by the state of commercial morality in Glasgow or any other part of Scotland. On one point we have had some doubt, viz. Forms 21 and 22, being the petitions to set aside transactions under the Insolvency Acts of 1621 and 1696. There is no doubt whatever that under the Bankruptcy Acts of 1856 and 1857 the Sheriff has substantial jurisdiction in such matters, and that without the necessity of reduction. Where, in the course of the sequestration, it is the duty of the trustee to make a demand for money or delivery of documents or goods, he is entitled to make that demand before the Sheriff, although in other circumstances the rules of pleading would have required a formal reduction, which remains competent only in the Court of Session. Now, Forms 21 and 22 adopt to a large extent the language of a summons of reduction; they ask that certain things shall be found null and set aside, which is quite unnecessary for the trustee's purpose, if he gets his money or his goods. As we read the decisions of

Dickson v. Murray, 4 Macp. 797, and *Moroney v. Muir*, 6 Macp. 7, the judges have rather discountenanced this "mongrel form of reduction;" and it would probably be more correct pleading to omit all reductive words. We may also observe that in certain cases, such as 49, 51, 53, 54, and 60, the authors have employed the new form of petition for a proceeding in bankruptcy, while in other cases they have adhered to the older form. The distinction here is not apparent.

In the forms of petitions relating to heritage there is, of course, more novelty, as all previously published Styles are in the old form of Sheriff Court summons or petition. Some of the new Styles, we are afraid, will not have many opportunities of being used; as in the case of Form 113 under The Artisans' Dwellings Improvement Act, 1875. But they seem to be revised with care. In Form 106, Count and Reckoning against a heritable creditor in possession, we should have preferred to see a distinct averment that the debt had been satisfied and paid by intromission, or that something else had occurred giving the debtor a right of inquiry. In Form 115, Interdict against Trespasser, it is stated that the defender once trespassed, but it is not stated that there is any reason to suppose he will again trespass. Form 119, Declarator and Damages, is no doubt important as illustrating the scope of section 8 of the Sheriff Court Act, 1877, but it seems to extend to unnecessary length for that purpose. The petitions relating to moveable succession include one Form, 153, as to the competency of which we have grave doubts. It is called a petition for exclusion against an executor for not concurring with his co-executors. The case stated is that of several persons being appointed sole trustees and executors under a trust disposition. One of them refuses to confirm, and the others ask the Sheriff to ordain him to concur in confirmation or else to exclude him from the office of executor, and to confirm the petitioners as the sole and only executors. We do not know if such things frequently take place in the Sheriff Court at Greenock, but such petitioners seem to us to be on the horns of a dilemma. If it is quite clear that the office given by the settlement is a joint one, then if one refuses to act the office falls, and no amount of exclusion by the Sheriff will set that matter right. If, on the other hand, the office is not joint, there is nothing to prevent confirmation passing in favour of such of the executors-nominate as are willing to confirm. Otherwise, the Sheriff would practically enjoy a power of appointing as executors such executors-nominate under a joint appointment as are willing to act. Upon the whole, this book will be a decided gain in point of convenience to the profession. The conception of it is excellent, and it goes over nearly the whole of the modern jurisdiction of the Sheriff. It is matter of regret that practitioners in the Supreme Court do not yet possess a similar collection.

International Law: Private and Criminal. By Dr. L. BAR, Professor in the University of Göttingen. Translated, with Notes, by G. R. GILLESPIE, B.A. Oxon., Advocate.

AFTER twenty years the author of the *Internationale Privat- und Strafrecht* has at length found a translator, and another member of the Scottish Bar has come to tread in the footsteps of Mr. Guthrie, when he did a like office for Savigny's eighth volume. Private International Law is a field which has hitherto found a scanty enough cultivation among us to make our welcome to another competent worker in it a genuine and hearty one. Activity in this sphere since Bar's work appeared has been less in Germany than in England, America, France, Italy, Belgium, or even Switzerland. The book of which Mr. Gillespie now offers us a much desired translation still remains, from the ability of its author and the originality of many of his views, the most prominent German production in its own province, and the only one which deals with the whole subject, since Savigny. To the English-speaking lawyer, to whom in the original it was a sealed book, it has hitherto been accessible only or chiefly in the abstracts of some of its chapters in Mr. Guthrie's notes. But the book before us is much more than a mere translation. On a rough computation, it contains about one-seventh more printed matter than the original, and so is, on a merely mechanical estimate, to that extent an original work on Private International Law, and one containing information on its latest developments. In this respect it follows the model of Guthrie's *Savigny*.

There can be no mistake as to the substantial difficulty of the task, and of the need for a thorough mastery of his text to a translator of any German work of a scientific or philosophical character. For while the German language has developed a native technical vocabulary of its own, English has borrowed it, hardly less in Jurisprudence than in the physical or mental sciences, from classical sources. We have been at pains to subject a few selected passages to a close comparison, and have come to the conclusion that the result of Mr. Gillespie's labours will thoroughly stand the test of a reading, both as an English work, and of a collation with the original. His competent and easy handling of the German idiom in the more, as well as in the less, technical parts of the work, is apparent throughout. His periods read easily and clearly, and there is no trace of the sin that so easily besets the German translator, of falling, either from inadvertence or unconscious infusion with the idiom of his original, into forms of expression that smack of their foreign source. If in some passages we might differ from him as to the most appropriate turn of phrase to give the full meaning of the original, there are more in which we cannot but admire the felicity of his choice of expression.

While duly grateful for what we do get, we are, however, inclined

to regret that the scheme of annotation does not embrace more by way of exegetical commentary on the text. The first, and one of the longest of the notes, follows the sections in which Bar expounds his somewhat obscure and complicated doctrine of the determination of status by "Domicil verbunden mit Wohnrecht." The phrase cannot be translated otherwise than we have it, "Domicile combined with right of residence;" but the principle embodied in the phrase is perhaps that part of Bar's theory which most of all stands in need of elucidation. We confess a repeated perusal increases our desire for such a commentary as Mr. Gillespie might have given us. This is one of the chief matters in which Bar differs from Savigny, and, indeed, from every previous writer on the subject, and shows the influence of the more recent theory of the determination of status, which has been imported into the subject by Italian jurists, followed by others in Belgium and Switzerland, acting on the older German theory of domicile. In one part, Bar sums up his theory in a sentence, which Mr. Gillespie translates: "Domicile, combined with right of residence, gives rise to nationality, and thereafter to citizenship." This by itself hardly conveys a definite notion. The original runs: "Domicil verbunden mit Wohnrecht begründet die Staatsangehörigkeit und demnach die Staatsbürgerrecht." The import of this rather seems to us to be that domicile combined, etc. (whatever that may definitely mean), gives rise to *allegiance* (that is, to the duties of the subject towards the State), and *accordingly*, or in consequence, to citizenship (that is, to the rights and privileges of a citizen), and then these two reciprocal relatives taken together make up that which is the determinant of civil status. But perhaps another reader would find our own rendering no clearer without a commentary, or very definite even with it. We give this as an illustration of the difficulty of the work. And here we may as well finish our fault-finding with the translation, which is summed up in the fact that Mr. Gillespie has, on p. 367, rendered the phrase

domicile as the determinant of civil status, while further on domicile is said to be her criterion as to succession and relations between spouses. On the two latter points we agree with our author. But that succession and the family relations can be separated, as to their determinant, from civil status, or that France adopts nationality as a criterion at all, we think inaccurate. A reference to the *Code Civile* gives no light, for it is on its terms that the controversy has arisen; but we know of no French writer who sanctions the nationality principle. Fœlix is as indefinite as the Code, and seems to consider nationality and domicile as identical, while Demangeat may be claimed on the other side. A quite recent writer in French, M. Brocher, indeed speaks unhesitatingly for nationality. But he is a Genevan Swiss, where that theory admittedly prevails. It is pointed out by Wharton that it is one thing for a small homogeneous country like Italy or Belgium, where a single codified law prevails, to adopt the sound and simple criterion of nationality, but quite another for a great federal Empire like Britain, the United States, or Germany. A British subject dies in Italy or Belgium, and a question as to his succession, involving possibly one as to his personal capacity, arises there. The principle of nationality will determine that it is to be regulated by British law, but not whether by English, Scottish, Canadian, Australian, Hindoo, or Mohammedan law. It is only a reference to domicile that can determine that. France, since the conquest of Algeria, not to mention her possessions in the East, is now in a like position; and so says Demangeat in a note to Fœlix. A definite conclusion cannot be drawn from the language of French decisions, since the terms "nationalité" and "domicile" seem to be used indiscriminately; and if some can be quoted as pointing in the one direction, quite as many may be cited for the other view. The countries which adopt nationality—at least Italy (we cannot speak with confidence for the others)—make it cover status and capacity along with succession and the family relations, just as Germany and Austria put them all under the rule of domicile. France, if Mr. Gillespie's view be the correct one, would thus be exceptional among continental States in separating them. The force of what we consider the right view—that they must all go together—seems to have influenced him to the effect of making his statements as to French succession conflict at different passages, as on pp. 114 and 461. On the latter page we have also a statement as to Italian law. "In Italy, residence for any considerable time will suffice to place the whole succession, heritable and moveable, under Italian law, as an universal succession," etc. Article 8 of the *Codice Civile* says that successions are to be regulated, as regards both heritables and moveables, by the nationality of the defunct. To this the above statement is in direct contradiction. That it is not meant to be so we have no doubt, but, as it stands, it cannot fail to mislead. For authority we are referred to

a decision of the Court of Appeal at Lucca. We have failed to find a case in the source to which we are referred in the preface, the *Journal de Droit International Privé*, under the date given, 8th June 1881; but we have found one under 18th June, which we take to be the case in question, and in which the matter at issue was the succession of a Tunisian Jew, who had died after a prolonged residence in Italy. He was held to have lost his original nationality, and never to have acquired another—to be without a nationality at all, and it was decided that, in the circumstances, Italian law should regulate his succession. All that was fixed there was simply that, when Italian law comes on a person of no nationality, it lays hold of residence as a means of bringing his succession under its disposition, for in such circumstances the express provisions of its Code cannot come into operation. The case is thus special in a high degree, and cannot possibly bear the inference drawn from it. It is always more than hazardous to draw a general doctrine from any one decision of a country with a codified law, where precedent holds an entirely different position from what it does with us; for there, judicial decision does not make law; the law is in the Code, and cannot be derogated from, except by express legislation. A decision is little more than an illustration, and holds more the position which an *obiter dictum* does with us than that of an authoritative precedent. The older Codes are frequently referred to by Bar, but Mr. Gillespie has not followed him in any notice of the Italian Code, which has come into existence since Bar wrote. The fact of its existence is not so much as alluded to. A student of the subject applying to him as a text-book would thus be left unaware of the emergence of the most important factor in comparative jurisprudence since the promulgation of the Code Napoléon.

The statement on p. 187 as to personal status in Germany needs modification by a reference to Art. 35 of the Prussian Code, which provides that, where two personal laws conflict on this head, that one is to be taken which is most favourable to the subsistence of the contract.

The foreign decisions are cited by names of litigants, tribunal, and date, sometimes only the last two. It is a pity we have not also the volume and page of the *Journal*. The year generally indicates the volume, but not necessarily so; and when the printer makes havoc with the names of foreign litigants and Courts, an attempt to verify the citation is sometimes trying to the temper. This nightmare of authors who deal in other tongues than the mother one of their printers—uncorrected misprints—has been haunting Mr. Gillespie not a little. The trail of its incubus is traceable on more than one page, and disfigures the first few lines of his own preface, where “Droit” claims attributes in two genders, and the editor of the *Journal de Droit International Privé* masquerades as “M. Edouard Chanet.”

Quandoque bonus dormitat Homerus; and the few slips we have noticed, amount to no more than an occasional nod. Of the excellence of the bulk of the work done, more especially the translation, which is the main part, we speak without hesitation. Of the portions which should be of special value alike to the practising lawyer and the speculative jurist, we may indicate Note K, on Bills; Note M, which deals with the conflict of laws in divorce, and with the much-vexed subject of matrimonial domicile; Note H, on the Limitation of Actions; Note W, on the *persona standi* of foreigners; Note X, on Jurisdiction; and Note Z, on Foreign Judgments. To work in this field at all is good, and to do good work is to deserve well of the republic of jurisprudence, and this Mr. Gillespie has done. We cannot better express our appreciation of the result of his labours than by saying that his book should form a fitting companion volume to the other in the same field, which has already taken its place as standard in Scotland, England, and America—that Gillespie's *Bar* may appropriately rest on the Private International Law shelf of the English-speaking lawyer—*par nobile fratrum*—cheek by jowl with Guthrie's *Savigny*.

[ERRATUM.—At page 28, line 35, in the review of Bell's *Law Dictionary*, the words Act of *Grace* occur instead of Act of *Faith*. The writer was evidently thinking more of Scots Law than that of the Holy Inquisition.—ED. *J. of J.*]

Obituary.

GEORGE MONRO, ESQ., ADVOCATE.—We regret to have to chronicle the death of this gentleman, which took place on the 12th ult. The following appropriate notice of the deceased appeared in the *Edinburgh Courant*:—"Mr. Monro was the son of Mr. Charles Monro of Berryhill, writer, Stonehaven. He passed the bar in 1827, and continued in the active prosecution of his profession till within three years ago. He was one of the most learned, careful, and industrious lawyers that ever graced the boards of the Parliament House, his leading peculiarities being an accurate knowledge of procedure and of the law applicable to the cases entrusted to him, with a most conscientious devotion to the interests of his clients. He was appointed later than he should have been—in the year 1866—to a Sheriffship; and he carried to the discharge of his duties as Sheriff of Linlithgow, Clackmannan, and Kinross, the same high sense of the duties of his office. While health allowed him, he never spared himself in conducting all the various judicial and administrative work of his three Sheriffships. It was not enough that the law required him to go a certain number of times in the year to the county towns to administer justice: he did so

whenever duty called him, and this was the case when any jury trial was on hand. But it is not merely as an advocate and a sheriff that his departure from among us is so much regretted: there were few benevolent schemes set on foot in which he did not take a part, and which he did not further by his presence and his purse. He was, besides being a lawyer, a man of considerable culture. Of the Arts he was a good critic, and wrote and published a book called *Scottish Art and National Encouragement*, containing a view of existing controversies and transactions during the twenty-seven years previous to 1846, which is a very interesting monograph of the subject on which it treats. The Royal Scottish Academy appointed him their standing counsel, and even to the present day the Academicians cherish a grateful remembrance of his efforts on their behalf in the controversy with the Board of Manufactures, which provoked the publication of the book referred to. He also published various pamphlets upon matters interesting at the time, and which yet possess a historical value from the many facts therein stated, and which by his industry he collected. His pamphlet on observations in defence of the office of the Sheriff-Principal was one of the best reasoned and most conclusive arguments upon his own side of the question which the controversy evoked. Lord Advocate Gordon recognised his abilities as a lawyer when in 1867 he employed him to draw up the Public Health Act for Scotland, which has been the most successful in revolutionizing the sanitary condition of the people that has ever been attempted in Scotland; and he followed that up by a most useful manual, which has gone through several editions, commenting upon the Public Health Act, with practical forms which have enabled the sanitary inspectors to put the statute into operation. He also edited Lord Mackenzie's *Treatise on Roman Law*; and although this was somewhat without the range of his ordinary studies, his learning, which he kept up to the last, enabled him to add improvements to that very interesting work. He was appointed a Commissioner in Lunacy for Scotland in 1866, and held the position of a director of the Commercial Bank of Scotland. Mr. Monro was a leal-hearted Conservative, although he never took any prominent part in politics. A genial and kind-hearted man he was at all times; he always kept his temper and never lost a friend. It is hard to part with a man of so much sound judgment and varied learning, accompanied by unaffected modesty and diffidence of his own powers. Mr. Monro was married in 1830, but his wife died five years later, leaving no family."

JOHN AUSTIN LAKE GLOAG.—In Mr. Gloag, who died at his residence, 10 Inverleith Place, on the 10th of January, his many friends have to mourn the loss of a man of singular warmth of heart and originality of character. He was born at Perth on the 14th February 1819, of a family who held an honourable place in

the legal profession: Originally intended for the traditional career of his ancestors, he was early apprenticed to Mr. James Condie, writer in Perth, and subsequently completed his studies in the office of his relative, Mr. Adam Ellis, W.S., and at the University of Edinburgh. Mr. Gloag's tastes did not lead him to cultivate the practice of his profession to the extent which his undoubted abilities warranted him in doing. Literature had more charms for him than law, and he was a frequent writer in reviews and periodicals, besides being the author of several novels. He ultimately became a partner with his cousin, Mr. George Burn, W.S., but had retired from business for a considerable time before his death.

The Month.

Sec. 70 of the Education (Scotland) Act.—The following is the substance of an address delivered by Sheriff Courie Thomson of Aberdeen, at the Congress of the Educational Institute of Scotland, held at Aberdeen last month. After some introductory remarks, the learned Sheriff said:—

I doubt not you have all received an impulse from the papers which have been read and the discussions which have followed. Education is necessarily progressive, and in it, as in other sciences, a healthy stimulus is of great importance. In the old Court-house, which stood on the site of this building, the judge was confronted by an inscription on the face of the gallery, in these words, "*Servate terminos quos patres vestri posuere*," a maxim not without appropriateness in a Court of Law, although not, in my humble opinion, containing the whole duty of the man who may occupy this bench; but I cannot think that it would be a suitable motto for the Educational Institute. To the educator is entrusted not merely the duty of conserving all that is good in the past, but of wisely adapting his methods to the ever-changing present, and even in no unimportant sense of preparing for the probable, though as yet indistinct, circumstances of the future. In the few moments during which I shall feel justified in detaining you, I shall endeavour to be practical, and therefore I shall not say anything as to the inestimable importance of education to the individual or to the State,—this nowadays would be superfluous,—nor shall I attempt to say anything as to the principles and methods of the science; this has already been done with much patience and minuteness by many thoughtful and experienced men—nor yet shall I yield to the temptation to say some words of encouragement to those who make it their task to devote themselves to the promotion of education: these will be taken for granted. But I shall ask you to allow me to refer in a few sentences to the practical working of a section of the Education Act which falls almost daily within my own observation, and which directly affects School Boards, teachers, parents, children, and therefore, not very indirectly, the whole community. The section to which I allude is the 70th of the Act of 1872, which provides.

for the prosecution of a parent who is "grossly and without reasonable excuse failing to discharge the duty of providing elementary education for his child." On this fact being proved, it is the duty of the Sheriff to convict and to fine or imprison. Such an enactment as this follows necessarily a provision that parents shall provide such elementary education. It is of the essence of a law, that failure to obey it shall be followed by punishment. Further, it is to be noticed that by a previous section, that which would be in the great majority of cases a reasonable excuse—viz. excessive poverty—has the ground cut away from beneath it, by the duty being imposed upon the Parochial Board of paying the school fees out of the poor fund. Now, I am one of those who attach very great importance to the compulsory clause, as it is called. It may be vindicated on several grounds, but it is sufficient to say that it is most valuable as a beneficial measure of what I may describe as "preventive police." It is a protection to the industrious, well-doing portion of the public against the pernicious consequences of the neglect, the selfishness, and the dissoluteness of the idle and the criminal classes. It is almost impossible to speak too strongly of the paramount duty of parents to secure the elementary education of their children. A great American says, and his words will commend themselves to you all, "To this good (education) all show and luxury should be sacrificed." Here parents should be lavish, whilst they straiten themselves in everything else. They should wear the cheapest clothes, live on the plainest food, if they can in no other ways secure instruction to their families. They should have no anxiety to accumulate property for their children, provided they can place them under influences which will awaken their faculties, inspire them with pure and high principles, and fit them to bear a manly, useful, and honourable part in the world. "There should be no economy," says the writer I have just quoted, "in education." Money should never be weighed against the soul of a child. It should be poured out like water for the child's intellectual and moral good. The compulsory clause has converted these social and ethical obligations into a legal duty, and although it is quite right that the law in this matter should be administered with tenderness, because the question of what is termed "gross" neglect, and what is "reasonable excuse," is always one of delicacy, the words being susceptible of various constructions depending on the special circumstances of each case, yet I have no sympathy with those who regard the enactment as tyrannical, or as unduly interfering with the liberty of the subject. The fact is apt to be overlooked, that the failure to give a child elementary education is a serious wrong to the child itself and to society, apart from legislative enactment altogether. It is not like poaching, for example, a mere creature of statute, a *malum prohibitum* only: it is essentially immoral and injurious to the commonwealth; it is a *malum in se*. If it be right to send a man to prison who fails to give his child sufficient food or clothing, and thereby destroys its health and its life, surely we are justified in punishing the parent who permits his child to grow up in brutal ignorance, not merely to its own irreparable loss, but to the almost certain injury of the community in which it shall come to maturity. With these views, as many of you know, the law with reference to compulsory education is, in this place, administered not, I trust, with rigour, but with due strictness. I am bound to say that I do not recall a case brought up in the Sheriff

Court in which the School Board did not seem to have exhausted every means within their power, short of punishment, to get the defaulting parent to comply with the demands of law. But cases do sometimes occur, and it is to these that I desire specially to direct attention, in which the education of a child may be said to be grossly neglected, and yet the parent ought not to be punished. I speak, of course, principally with reference to towns and populous places. Such are the cases where there is only one surviving parent, who is obliged to be from home from early morning till late at night making a living for his family. He cannot do otherwise. We shall suppose that the parent is well behaved and industrious. The children are suitably clothed, the school pence are provided, and they are regularly sent off to school. But soon they begin to play truant, at first for a few hours, then for days and weeks, until the astonished and dismayed parent is one day informed by the officer of the Board that his child, who he honestly believed was at school all day long, and every day, was wandering about the streets, and already associating with bad company. The child is duly warned by the parent, is probably well warmed as well, and promises to attend regularly for the future. But by and by he is at his old tricks again, and now is summoned to appear before the School Board, who doubtless point out to the parent that he is responsible for his child's education, and that he must manage to do his duty in that respect. The excuse that he is out at work all day, and that he cannot afford to pay any one to "herd" his children into school, is urged, and he is probably dismissed with an admonition, having promised greater vigilance for the future. All this time, however, the child has not been without education, but it was an education in the school which is kept in the streets, and alleys, and public-house doors, and in which the devil is the schoolmaster; and now careless of parental remonstrance, and defiant of authority, he does not even make a pretence of attending school or trying to do well. By this time the School Board, and perhaps the Sheriff Court, has before it these facts: a child getting rapidly beyond school age almost entirely ignorant, and on the verge of crime: a parent who has a good home, and is able to pay for his child's education, and who has done all he can, consistently with earning a maintenance for himself and family, to secure education for his child, but who has failed to do so. The problem is, What ought to be done with that parent and that child? Are we to punish the parent? Probably in some cases, such as those to which I refer, in which by doing just a little more than he or she has done, the end might have been attained. A friendly neighbour, herself at home all day, might have acted as shepherd, and seen that the child or children actually went to school as the parent thought. But I should be slow to hold that the failure of duty here was so "gross"—and that is the strong expression used in the Act—as to impose upon one the necessity of fining or sending to prison. The parent has an excuse, and I think most of us would think it a "reasonable" one. But even if the parent be punished, what better are you? Punishment is only the means to an end, and the end ought to be attained is the education of the child. The fine or imprisonment only diminishes the ability of the parent to do better than he has been doing, and I am assuming that he already has the will to do his best. Then, what are we to do with the child? To that question, in

the present state of the law as it exists in Scotland, it is not easy to give a satisfactory answer. There is no power to take the child by force to school and to keep him there all day. I do not suggest that there ought to be such a power in connection with our Board Schools. But the only sort of school to which he can be sent and detained by force of a legal warrant, is the ordinary Industrial School. Such a child as I am supposing, however, does not fall within any of the clauses for whom Industrial Schools are established. He has a well-doing parent and a comfortable home. It would be a misfortune to break up the natural family ties, and to put asunder that which God hath joined—parent and young child. Accordingly, what I desiderate is an institution in our large towns similar to the Day Feeding Industrial Schools or the Truant Schools of England, to which children in the circumstances which I have described (and the picture is not fanciful, there are scores of such cases in this city) may be taken under warrant daily and retained till evening. I believe that in this way a hiatus in our system would be filled, and hardship to parents, as well as injury to children, obviated. I venture to commend the suggestion to the members of the Congress. I hope they may succeed where hitherto I have failed, as I have more than once laid my views before the Department, whose officials admitted the truth of all I said, treated me with much courtesy, and did nothing. Let me add only one more suggestion arising out of this subject. It is sometimes said that the existence of a poor law, and of a school rate, tends to dry the springs of private benevolence. There is probably some truth in this, even if there be no “reasonable excuse” for it. But allow me to point out one form of charity in which all of us may help our poorer brethren to get their children sent to school under suitable conditions. There are a great many families who are not proper objects of parochial relief, and whose feelings would be quite unnecessarily outraged by receiving it, who have a very great struggle to get clothing sufficient to enable them to send their children to school comfortably clad. It is not uncommon for the compulsory clause to be contravened from this form of destitution. A very venial phase of pride keeps some well-doing people from doing their duty to their children, because they cannot clothe them according to their notions of what is respectable. A very little self-denial and thoughtfulness would enable most of us to do something in this direction, and in case any of you who live in Aberdeen feel difficulty in knowing how to set about the good work, you will pardon me if I remove that excuse by stating that the Association for the Poor is in helpful relations to the School Board in this matter, and that any disused clothes you may send to the offices of the former will be applied for the purpose I have indicated. But now, I must not forget that this is a conversazione, which by no ingenuity can be defined as meaning an occasion for one man monopolizing the speaking. I have to thank you for giving me the opportunity of throwing out these few hints on a subject with which I may claim some practical acquaintance, and which is not altogether foreign to the great cause to the promotion of which most of you have devoted yourselves. With all humility I venture to wish you the greatest success in the noble enterprise in which as an Institute you are engaged. My only fear is a selfish one. When you have got education in accordance with the high ideal at which you aim, there will

speedily come a very calamitous time for the members of the legal profession. When all bargains are made with perfect accuracy and intelligence so that no difficulties can arise, and when the temptations to dishonesty or violence have been educated off the face of this Empire, the period will have arrived when the whole brood of lawyers should be betaking themselves to fresh fields and pastures new. But I daresay we shall continue to exist, even though it be as necessary evils, for at least one generation.

Unauthorized Legal Practitioners.—We are glad to find from the following paragraph, which we take from one of the daily papers, that a certain amount of retribution has overtaken one of those persons who advertise legal advice at nominal sums. There can be little doubt, however, that for one of their dupes who has courage to prosecute them, many pay fees for advice which only entangles them more in the toils of the so-called “lawyer.” In connection with this we may ask, What has become of the proposed Incorporated Law Society for Scotland? At present there seems no body whose duty it is to take cognizance of such cases as the following. The Solicitors’ branch of the profession has not in many respects been improved by the passing of the Law Agents (Scotland) Act, 1873, and such a society would probably exert a good influence over it:—

Action against Pseudo-Lawyers.—At the Small Debt Court in Glasgow,—before Sheriff Mair,—Robert Brand, shipmaster, sued William Cross Mackie, designated in the summons as ‘carrying on business as a law-agent in Glasgow, under the firms of Bruce & Co., and Baxter, Mackie, & Co.,’ for the sum of £12. The pursuer states in his summons that defender on certain dates fraudulently obtained from him different sums of money, amounting at least to the sum sued for. The fraud consisted in the defender, ‘who was not a law-agent, but a dismissed or suspended sheriff-officer, and convicted and sentenced to a lengthened term of imprisonment for crime,’ having falsely represented that he was Mr. Bruce, law-agent, and induced pursuer to give him these sums of money. Mr. Angus Campbell, writer, appeared for pursuer, and Mr. Robert Scoular, writer, for defender. Mr. Scoular asked a continuation of the case for a week, as some of his witnesses could not appear. Mr. Campbell objected to this course, and read an advertisement from a daily paper, in which it was stated that Mr. Bruce gave legal advice for 1s., and that the business had been established since 1859. On the strength of that advertisement, his client called upon whom he believed to be Mr. Bruce, who was accurately described in the summons as a dismissed or suspended sheriff-officer and messenger-at-arms. Mackie, in fact, signed himself as Bruce, told his client that his name was Bruce, and got money as Bruce. The defender had been asked to refund the money, but refused. Mr. Scoular said that he was not prepared to go on at present, and intimated his withdrawal from the case. The Sheriff then gave decree for the sum sued for, with expenses.”

Correspondence.

(To the Editor of the Journal of Jurisprudence, Edinburgh.)

PERSONAL REGISTERS.

SIR,—In the “Notes as to the Effect of the Conveyancing Act of 1874 upon Personal Searches,” which appeared in your journal of January of this year (page 30), an interesting account is given of the uncertainty existing as to the requisites of a “safe” search in the Personal Registers, in lending on, or otherwise dealing with, heritable property. Any uncertainty of this kind must be regarded as a serious matter, apart altogether from speculative questions as to the degree of risk incurred; because the perfect security of title, with which such investments are generally credited, is regarded as indispensable by the majority of the cautious class of persons who choose such investments.

The only purpose for which a Personal Register seems to be indispensable is the registration of diligence and other proceedings of an inchoate character, which, when properly followed out, will found rights capable of infeftment, which will then supersede the registration in the Personal Register. From the latter qualification no exception need be made of proceedings of a declaratory or rescissory kind, as these, so far as affecting heritable property, may be resolved into, or are capable of being dealt with as, adjudications of rights derived, immediately or remotely, from infeftments. It therefore seems to me that the requisites of a “safe” search in the Personal Registers might be best simplified and defined by enacting that all such proceedings, so far as resting for their validity upon registration in the Personal Registers alone, should, like inhibitions, fall under the short prescription, unless notice of renewal be registered. If it be thought necessary to provide a mode—short of infeftment—for prolonging the effect of registration of any of such proceedings, without the necessity of renewal of registration, in the manner in which sequestrations or adjudications endure under the present law, I would suggest that power be given to the party registering such proceedings in the Personal Register to get a reference marked thereto on the margin of the record of the last infeftment of any property which he desires to continue attachable in pursuance of these proceedings, so that such proceedings may be discoverable upon searching the Property Register; and that, upon such reference being marked, these inchoate proceedings should be allowed to be effectual, *quoad* the rights standing upon that infeftment, if these proceedings be pursued to infeftment within the period of the long prescription, although the registration in the Personal Register may not have been renewed. I think it is worthy of the attention of all who

desire to see heritable titles adapted to serve their purpose easily and effectually in all cases, to consider fully what would be the effect of making such an alteration of the law, in conjunction with the improvement of the process of infeftment suggested in the latter part of my letter appearing in your journal of January 1880 (pages 43 and 44). To illustrate the effect of such changes by an analogy which will be readily realized by practical persons, I might compare the record of an infeftment, under such a system, to a complete balance-sheet of a business. The terms of the record of the infeftment, coupled with the reference it would contain to the prior infeftments upon which it rested, would show what must be placed to the *credit* of the infeftment; while the references on the margin of the same record, to all the infeftments exhausting it to any extent, supplemented merely by a five years' search in the Personal Register for inchoate proceedings not yet pursued to infeftment, would show everything to be placed to the *debit* of the infeftment; and the difference being the *balance* with which the party infeft could deal, would appear at a glance. Such a complete and coherent record of conflicting rights to the property in question would clearly be much more useful and efficient than the record of an infeftment under the present system, which affords a very imperfect account of the rights to the property, leaving the searcher or agent at sea upon many subjects of inquiry, and with elements of uncertainty as to his proper course. The praise which has in some quarters been lavished on the supposed perfection of the present system of publication of heritable rights, sounds in the ears of a country conveyancer very like that accorded by certain old inventors to flying machines designed by them, which, though beautifully intricate in design, had the unfortunate drawback of being unable to go. To such a conveyancer, trouble and expense are known to be as truly factors in determining efficiency as friction or gravitation to an engineer. I do not think that the complexity and expense of heritable titles can continue to be regarded as sufficiently compensated for, unless some such system be adopted, under which perfect security can be assured without difficulty.

SIMPLEX.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF PERTSHIRE.

Sheriff BARCLAY.

A. R. B.

Master and Servant—Contract—Common Law Procedure.—The facts are fully explained in the notes of the Sheriff-Substitute.

Perth, 6th June 1882.—Having heard parties' procurators and made *avindum* with the proceedings, Finds the complaint is intended to enforce com-

plete performance of a civil contract between master and servant, and that at common law, under the usual procedure applicable to Sheriff Courts, and concluding that the servant be ordained to return to his service, and to find caution for the fulfilment of his contract, and failing finding such caution, to commit him to prison until he finds such caution or '*be liberated in due course of law*;' sustains the preliminary plea, dismisses the complaint, and decerns against the pursuer in favour of the respondent for one guinea of expenses; reserving to the complainer all competent remedy. HUGH BARCLAY.

"*Note.*—There is no question but that a contract between master and servant is purely a civil contract. This is an action in the Sheriff Court at common law, and not under any statute. There is this objection at the very outset. It is brought before the Sheriff as an *ordinary* part of his jurisdiction. If so, it behoved to be in the form prescribed by the Sheriff Court Act, 1876. See Case 15, June 1879. That application was a *cessio*, where no particular individuals are called or defences required. This is a trifling objection, which perhaps might be obviated. The other objections are insurmountable. The present complaint is laid *entirely at common law*, and not on the 'Employers' or 'Summary Jurisdiction' Acts. It seeks to enforce a civil contract, not by an award of damages for breach of contract, but by *specific* implement, under pain of imprisonment for an *indefinite* term, and thus it assumes the character of a *criminal* complaint to enforce a *civil* contract. Being a civil contract and debt, imprisonment, either *directly* or *indirectly*, is no longer allowed to enforce implement. Damages are the only remedy for its breach by either party, and which can no longer be enforced by imprisonment. It was long a contested point whether the contract between master and servant could be enforced otherwise than by an award of damages for breach on either side by the contracting parties. The problem was at last thought to be worked out by assuming that the breach on the part of a *servant* became a *police* offence. The reason was said to be, that whilst the desertion or neglect of a servant might interrupt or stop a whole factory, or prevent the cultivation of a farm, the delict of a master could have no such disastrous effect. After much vacillation, summary warrants of imprisonment became at length in *some degree* sanctioned. The servant was ordered to *return* to his service. Imprisonment could certainly not ensure the performance of the service; whilst the servant was ordained to return to his service, and to find caution to do so, it was always incompetent to compel him to *continue* in the service, as is here asked (21st May 1833, *Stewart v. Shaw*, 628; and many subsequent cases). So, while he might be compelled to return to his service, he might desert the very next day. The total nullity of proceeding at common law was well stated in Baird's *Law of Master and Servant*, in a passage which is quoted in the *Justice of Peace Digest*. The difficulties in endeavouring to compel performance at common law of the contract of service were so obvious that recourse was had to an Act of Parliament, 4 George IV. c. 34. This Act was obviously one of a series of statutes intended *solely* for *England*, and as such was stated by Sheriff Tait, in his *Treatise of Justice of the Peace Law*, as *not* applicable to Scotland. But being a *British* statute, and this section of the United Kingdom not being *excluded*, it was eagerly seized on as some remedy for the inefficiency of common law, and was largely resorted to. The jurisdiction under this Act was confined to the justices, an evidence that the Act was designed only for England. It had this inequitable bearing, that it only applied to the *servant*, and was highly *penal*, or rather *criminal*. No fine was allowed, but only imprisonment for any period not exceeding three months *with hard labour*. Where this addition was omitted in one case, the servant was held entitled to get the sentence quashed as not receiving the full *quantum* of statutory punishment (30th June 1862, *Thow*, 4 *Irvine* 196, 34 *Jurist* 587). The servant was treated as a felon, and the master was not liable to aliment the prisoner under the Act of Grace, but he was sustained on prison diet at the expense of the public. The harsh and inequitable operation of the Act 4 George IV. c. 34, was much and justly complained of. A Committee of the House of Commons received evidence,

and on their report the Statute 1867 (30 and 31 Vict. c. 141) was passed. This Act applied to *both* sections of the United Kingdom, and was found to be most beneficial. The jurisdiction was given to the Sheriff as well as to the Justices. *Both* masters and servants were subject to its provisions. The complaint was heard in the most summary manner, and the award of damages against *either* party was enforced by immediate imprisonment for any period not exceeding three months, *but without hard labour*. The award in most cases against the servant would have been altogether inoperative without enforcement by imprisonment. The Act was limited to one year, but it was found so beneficial that it was carried on by continued statutes for several years. The operatives still unfortunately continued to agitate, and at length succeeded in obtaining the 'Employers and Workmen's Act, 1875' (38 and 39 Vict. c. 90). The jurisdiction is now given in Scotland *solely* to the Sheriff. It has been generally acknowledged that the Act of 1867 was much better for both master and servant, and consequently the Act 1875 has been much less resorted to than its predecessor; only one case has been brought in the Perth Court under the Act 1875. The Act is extremely vague in its clauses as to the claims which fall within its scope. It clearly deals only with claims of *damages*, and no clause authorizes the remedy sought by this complaint—to enforce a civil contract by summary imprisonment. This is the first application of this character under common law presented in the Perth Court since the passing of the Act 1867, which clearly shows the feeling of the public that statute law is essential to enforce such contracts. An award of damages in the case of a servant is now wholly unavailing. It can no longer be enforced by imprisonment. Moveables the servant has little or none. Wages can no longer be attached when less than £1 in the week, which is the general case, or if more, it can be easily evaded. The reverse is now the case from what it was under the Act of 4 George IV. It then only could be enforced on the *servant*. Now he is free, and the *master* is alone effectually exposed to the penalty of breach of contract. Lord Fraser, in his exhaustive volume on the law of master and servant as to complaints under common law to enforce implement, observes (p. 729), 'This is a form of complaint that will *not* in all probability be much resorted to, and it *ought not*, because, according to the last expression of judicial opinion so far as regards a *servant* as distinguished from an apprentice, the First Division of the Court were equally divided as to the legality of the procedure, and appointed minutes of debate for the purpose of obtaining the opinion of the whole Court (26th February 1846, Lees, 18 Jurist 273; the case was compromised). As no master is under any necessity to resort to this *doubtful* procedure at *common law* when he can obtain the same remedy with safety under the Master and Servant Act, 1867, his best course is to *avoid* common law procedure, and follow the statute.' In a previous part of Lord Fraser's work he states 'that it would rather seem that the Courts of Equity in England refuse to interfere for the purpose of enforcing *specific* implement of a contract of service, and that damages *only* can be recovered' (p. 43). These were his Lordship's opinions before the Statute 1875 superseded that of 1867. But if such were his doubts then, they must be greatly increased by the new statute, which only gives power to award damages, without power to enforce payment by summary imprisonment, as was given in the previous Statute of 1867. It will not be surprising that before long the Legislature will once more be appealed to for some further enactments to render the contract between master and servant more equitable. As the law now stands, certainly there is a grievous *wrong* without any adequate *remedy*, or rather without *any remedy*. This is surely an obvious surcease of justice. At the most critical seasons of agricultural labour—the sowing or reaping of the crop—the whole farm servants may desert their service. In this very case three of the complainer's servants have done so, at a most important season of the year. A judge, however, cannot *make*, but only *administer* law. The Sheriff-Substitute is satisfied that the contract of master and servant is civil, and cannot be enforced except in the usual form of violation of civil contracts, except advantage be taken

of the Statute 1875, which limits the damage to £10, whatever may be the amount actually occasioned by the one to the other party. In case of a servant, the award of damages is generally wholly worthless. H. B.

"Since writing the preceding notes, the Sheriff-Substitute has had the opportunity of seeing the third edition of Lord Fraser's book (just published), edited by Mr. William Campbell. The Sheriff-Substitute finds that his opinion is corroborated by Mr. Campbell. He states: 'It is unnecessary to discuss the question whether the radical alterations on the law of employer and workman are consistent with sound policy, but their *effect* is obviously decidedly against the employer. *They leave him without any practical remedy against the workman.* He is, in fact, *helpless* when all he can do is to obtain a decree for damages, to be enforced like a decree for any other debt' (p. 374). At a previous part of the treatise the editor observes, 'Looking to the fact that common law proceeding has (if now *competent*) been allowed to fall into desuetude, it is hardly necessary to state what is the form of procedure' (p. 108). H. B."

Act. Jameson—Alt. Mitchell.

HAY AND KID v. THOMAS ANDERSON.

Auctioneer—Price of Subject sold—Title to Sue.

"This was a case in the Debts Recovery Department of the Perth Sheriff Court. An heritor sold the crop of his home farm. The pursuers were the auctioneers. The purchasers were to pay the price before interfering with the crop, which was to be removed before a certain named date. The pursuers accounted with and paid over the proceeds of the sale to the proprietor. In defence, the defender pled as *preliminary* 'no title to sue,' and on the merits that the pursuers interfered with the potatoes which were the subject of the purchase and action. Parties agreed to the sale of the potatoes. The following interlocutors and notes were given. The particulars of the case are noted:—

"*Perth, 6th June 1882.*—Having heard parties' procurators on the preliminary pleas of 'no title to sue,' in respect of the admitted *special* circumstances: repels the preliminary plea, and allows parties proofs of their averments on the merits: Grants diligence against witnesses, and assigns the fifteenth day of June current, at eleven o'clock forenoon, for the proofs. HUGH BARCLAY.

"*Note.*—The Sheriff-Substitute has frequently decided, that in the *general* case an auctioneer has no title or interest to sue for the price of articles of which he was not proprietor. The articles remain the property of the owner, and the price thereof is due to him alone. The auctioneer is the mere *medium* of *transference*. A payment made to the owner by the purchaser would be good, though without consent of the auctioneer. An arrestment in the hands of the purchaser by a creditor of the owner would be valid and exclude any claims of the auctioneer. A set-off against the owner would be good on the part of the purchaser which could not be defeated by a claim by the auctioneer. In *this* case the potatoes were never in *possession* of the pursuers. In most cases there are written or printed articles of sale or roup which give to the auctioneer a right to sue and recover. Such becomes a contract between the auctioneers and purchasers. It is admitted that the pursuers did guarantee the proceeds of sale to the owner, and has actually paid them. This, however, cannot be held as an assignation of the property of the articles to the auctioneers. It is admitted there was no written articles, but a mere *verbal* notice that the prices were to be paid before removal of the articles. But it is not said *to whom* the payments were to be made, or even that the pursuers had guaranteed the price. The mere payment by a third party to the owner of the property, even by the auctioneer, cannot be held to imply an *assignation*. It would remove the difficulty were the owner made a consenting party to the action, which the Sheriff-Substitute has often seen done. In England there are several cases where an auctioneer has been held to have a title to sue for articles sold by him.

But in these cases it seems there was express conditions of sale, authorizing the auctioneer to sue. It was admitted that there is no decided case in Scotland, where the title of an auctioneer to sue as such, with or without guarantee of the proceeds, has been sustained. It can be well understood how articles sold in a *saleroom* without statement of whose property they are, that no person is recognised but the auctioneer and the purchaser. The pursuers referred to an action in this Court where the Sheriff-Substitute had in a case at the instance of the same pursuers refused their title as auctioneers to sue, but the then Sheriff (now Lord Adam) reversed and sustained the title. In that case the Sheriff relied altogether on English decisions. There was this speciality in that case, that the horses which were sold, were sold by auction in the pursuers' *mart* with printed notices and conditions of sale. The Sheriff-Substitute has with some hesitation repelled the preliminary pleas because of the admitted facts, and more especially that in the correspondence the defender *recognises the pursuers as the creditors* in the debt, and as such pleads a counter claim against them as interfering with the subject sold, and he judicially agreed with them for the disposal of the potatoes. There is also no conflicting claims, either by the owner of the subject, or any creditor of the defender, so that he can show no interest to raise the question. The Sheriff-Substitute still inclines to the opinion that a mere auctioneer has no property in the subject he sells, or in the price which it brings, any more than a simple mandatory agent or factor can supersede his principal.

H. B."

After a proof on the merits, the following interlocutor was pronounced:—

"*Perth, 14th July 1882.*—Having heard parties' procurators and made *avizandum* with the process proof and debate: In respect of the facts set forth in the annexed note, assolis the defender from the claim sued for, but allows the pursuers to receive the free proceeds realized by the sale of the potatoes sold under warrant with the mutual consent of parties: Finds the defender not entitled to expenses, and decerns.

HUGH BARCLAY.

"*Note.*—On the 15th August 1881 the pursuers sold in various lots about an acre of potatoes then on the ground to the defender at a public sale, at the cumulo price of £14, 2s. 10d. There was no written articles of roup read to the assembly, but it was verbally announced that the purchasers should lift their potatoes by the middle of October following the date of sale, and pay or give security for them before removal.

"The pursuers guaranteed the proceeds of the sale, and paid to the owner the same, including the purchases of the defender.

"The defender did not lift and remove his potatoes before the time stipulated. The weather was unpropitious for this work during October, though other purchasers of potatoes accomplished the work. The defender became insolvent, and on the 19th November he executed a trust deed in favour of his creditors.

"The pursuers called on the defender to lift the potatoes and pay the price thereof, and on the 11th November they wrote the defender, that as 'the potatoes remain in great danger, they (the pursuers) cannot afford to see them absolutely lost, and will instruct some one to lift them and hold you (the defender) responsible.' No answer appears to have been returned to this letter. On the 6th and 7th December the pursuers employed Mr. Lynch, a contractor, to lift and pit the potatoes. The defender remonstrated at this interference. On the 8th December defender or his trustee caused a letter to be written to the pursuers intimating a claim of damages for their interference with the potatoes, and stating that 'after what you (the pursuers) have done you may deal with them as you please, but neither the defender nor his trustee are to be held responsible in any way.'

"Nothing appears to be done until the 11th and 12th January 1882, when the pursuers employed Mr. Gorrie, potato merchant, to uplift and pit the remainder of the potatoes, as the ground was required for cultivation.

"On the 22nd February the pursuers brought this action concluding for £14, 2s. 10d., the price of the potatoes, with £1, 9s. 7d. paid Mr. Lynch and £2, 14s. to Mr. Gorrie, making in all £18, 6s. 5d.

"The defender pled as preliminary that the pursuers had no title to sue, and that his trustee ought to have been called. On the merits he pled that the pursuers by their interference with the potatoes had forfeited their claim against him, and were liable to him in damages. After some discussion the preliminary pleas were repelled. By consent of parties, warrant was granted to Mr. Watters to sell the potatoes. They brought in lots the sum of £5, 1s., and deducting £1, 1s. for expenses, £4 remained, which the pursuers may obtain.

"A long proof was led on the merits. It appears that at the final sale by Watters, a portion of the potatoes had been well protected and brought a fair price. But the remainder were in a bad state, and were sent to the Farina Mill. There was a conflict of evidence as to the time necessary for the work done and as to the fairness of the charges, amounting in all to £4, 3s. 7d.

"So soon as the defender failed to lift the potatoes and pay their price, the pursuers' remedy was to bring him immediately into Court, and on obtaining decree they could have pointed the potatoes and judicially realized their value. Another, but more costly remedy, was to have presented an application to the Court to compel the defender to uplift, and on payment to remove the potatoes, or failing his doing so to have them sold and decree for the deficiency given. After the distinct notice contained in the letter of 8th December, this was the more necessary and only remedy, and debarred all further interference by the pursuers with the potatoes. In trifling matters the Sheriff-Substitute, in consideration of the great comparative expense of judicial authority, has frequently held that distinct notice of something to be done, a tacit acquiescence by the other party, might be held equivalent to judicial authority. But all this is wanting in this case, especially after the letter of 8th December. This action was not brought until 22nd February.

"The defender being primarily in fault in not lifting his potatoes in time, and again in failing with his preliminary pleas, cannot expect to obtain costs.—H. B."

On an appeal, the Sheriff on 3rd October affirmed the previous interlocutors *simpliciter*.

SHERIFF COURT OF CAITHNESS.

Sheriff-Substitute SPITTAL.

HARPER v. THE NORTH OF SCOTLAND STEAMBOAT COMPANY.

This was an action just decided by Sheriff Spittal in the Wick Small Debt Court, in which Mr. Harper, auctioneer, Pultneytown, sued the North of Scotland Steamboat Company for £12, as compensation for loss of market of 29 barrels of early matties, shipped by the pursuer at Wick for Stettin by the defenders' steamboat. The Steamboat Company failed to send on the fish from Leith by the first vessel, the market of that week was consequently lost, and by the time the consignment reached their destination there was a fall in the price to the extent of the amount sued for on the parcel forwarded. The defenders maintained that the barrels were short shipped on account of Mr. Harper having mismarked them, and in any event they were not liable for the damage. The following is Sheriff Spittal's decision, which fully explains the case:—

"On Thursday, 6th July 1882, the pursuer prepared two lots of herring for the continental markets, and shipped them at Wick, on board the defenders' steamer *St. Nicholas*. After the barrels were put on board the defenders' boat for conveyance to the Continent, the pursuer handed to the defenders' clerk the shipment note 7 of process. This note bore his own name as shipper or consignee, and the name and addresses of the consignees. 29 barrels were consigned to Holterman, Hamburg, and 29 to Carl Wrede, Stettin. Under the heading 'marks,' opposite the Hamburg lot, there was a five-pointed star, with the word 'full' in its centre; while opposite the Stettin lot, in the same column, there was written 'do.,' implying that the mark on the Stettin lot was the same as on the Hamburg lot, viz. a five-pointed star with 'full' in its centre.

"The pursuer, in his evidence, gave us further information as to the barrels.

He said that on the bottom of all the barrels there were the initials J. E. H., the Hamburg barrels having on the head the star and word 'full,' while on the Stettin barrels there was a star and the letter M. If this be so, then, of course, his shipping note was erroneous.

"All the barrels were duly conveyed to Leith and landed there, in order to be transferred to the steamers of Currie & Co., trading from Leith to the Continent.

"Along with the fish, the defenders' agent at Wick sent to Leith the pursuer's shipping note 7 of process, and his usual manifest, a copy of which was produced, 15 of process. This manifest bears, under the heading 'marks,' 'J. E. H. on bottom,' and a five-pointed star, with the word 'full' in its centre, opposite both the Hamburg and Stettin lots.

"The *St. Nicholas* reached Leith early on the morning of Saturday, 8th July. The Hamburg barrels were reshipped the same day for Hamburg, and duly reached their destination. The Stettin barrels were not sent off from Leith until Saturday, 15th July, and the pursuer now brings this action of damages for loss of market consequent on this delay.

"The first question is, why were the barrels not sent off on Saturday, 8th July, by the Stettin steamer *Buda*, which left Leith that afternoon?

"The first information which reached Wick as to the delay in transhipping was contained in the telegram, No. 8 of process, sent by the defenders' agent in Leith to their Wick agent, on Monday, 10th July. This telegram says:— 'All herrings, Hamburg and Stettin, transhipped Saturday, except 29 barrels. Stettin—from J. E. Harper. Steamer full. Next steamer, Saturday. Hamburg steamer, Wednesday. Advise sender.' This message was immediately communicated to the pursuer, whose reply was to the effect that that was no business of his, and that he would hold the defenders liable for any loss that might ensue.

"The plain meaning of the telegram, and the meaning which was attached to it here, when it first came, is, that the pursuer's Stettin barrels were not shipped because there was no room for them in the Stettin steamer.

"The evidence, taken at Leith on commission, is hardly reconcilable with this. It appears from the evidence of the defenders' agent and clerk at Leith that on 8th July they made out a manifest for Currie & Co. (9 of process), with particulars of goods to be transhipped. This manifest is, or is supposed to be, compiled from the shipper's notes; but in this instance, under the heading 'marks' in the manifest, there stands opposite the pursuer's Hamburg barrels the entry of a five-pointed star, with 'full' in its centre, on head end, 'F. on bottom;' and opposite the Stettin lot, the entry 'do.' This entry corresponds neither with the pursuer's shipping note nor with the pursuer's evidence.

"This manifest was handed to Currie & Co.'s clerk, who in his turn made out from the manifest a bill of lading, with the marginal entry, 'star on head, F. on bottom.' This bill of lading was made out in expectation that barrels were to be shipped on Saturday, 8th July, by the steamer *Buda* for Stettin—Mr. Carl Wrede being entered as consignee. But Currie & Co.'s clerk, after they got the defenders' manifest, and made out the bill of lading, saw the barrels, and in the evidence he tells us that the barrels had no star on them, or other mark than J. E. H., and the defenders' clerk at Leith also says that he saw no star on the barrels. This gives us four different descriptions of the barrels. The bill of lading, afterwards altered for shipment by the *Vistula*, of 15th July, has the marginal entry J. E. H., with a cross and the letter M., coming near to the description given of his barrels by the pursuer in his oral evidence. What precise marks were upon the barrels is thus not at all clear; this much being clear, however, that his barrels did not bear the star and word 'full' in its centre represented in the pursuer's shipping note.

"There was thus undoubtedly some inaccuracy as to the description of the pursuer's barrels, and the general result of the defenders' evidence at Leith is that the barrels were not shipped by the *Buda* of 8th July, because they had no star, as represented in the shippers' note, and because the name of the con-

signee was not known. But the name of the consignee was known, for it was entered in the bill on lading made out in ample time for sending off the barrels by the *Buda*. The 29 barrels were then all ready for shipment, and there must have been some other reason for not shipping them than the alleged uncertainty as to the consignee. The examination of the witnesses took place four months after the 8th July, and the memories of the witnesses, I think, are at fault, a not very extraordinary thing, considering that on the Saturday in question there were nearly 3000 barrels then shipped for the Continent, and in the subsequent hurry and bustle it is not to be expected that all the facts connected with a small lot of 29 barrels would be accurately noted or distinctly remembered. I think the real reason for the short shipment was that contained in the telegram of 8th July, viz. that the steamer was full.

"The second and more important question therefore now arises, whether this short shipment, being caused by the *Buda* being full, the defenders are liable in damages for the loss of market thereby occasioned.

"The pursuer does not allege any special contract with the defenders for conveyance of his herrings to the Continent on any particular day, or by any particular boat. He had received from the defenders in June, or early in July, a notice of their through-going rates for carriage to Stettin and other ports, 'including storage, cartage, and cooperage at Leith,' and it was an understood thing that the defenders, receiving herrings at Wick, undertook to convey them to Stettin or other ports, without the shipper having to employ any agent at Leith to arrange and superintend transshipment there. The pursuer contends that, the defenders having received his herrings at Wick on 6th July, were bound to carry them through to Stettin without loss of time, and that the fact of the *Buda* being full is not a valid defence.

"The first authority cited by the pursuer was *Campbell v. Caledonian Railway Company*, in 1852. That, however, was the case of the total loss of a passenger's personal luggage, and has no application here.

"Lord Ardmillan, in the case of *Finlay v. North British Railway Company*, 8th July 1870, 8 Macp. 965, observed: 'An action, not for loss of goods, but for loss of market only, in respect of failure in rapidity of carriage, is not altogether in the same position as an action of damages for loss or injury of the goods. The mere acceptance by the carrier of goods entrusted to him for carriage and delivery, created at once a responsibility for safe carriage and delivery in due course. No special contract is necessary. . . . But where the exigencies of a particular trade require unusually rapid carriage and prompt delivery, the responsibility of the carrier in regard to the particular matter of speed in transit is generally made a subject of contract, in which the carrier undertakes for a certain charge to transmit within a certain time.'

"In *Finlay* there was a special agreement between a fishmonger and the Railway Company for carriage of his fish at low rates, he freeing the Company for liability for loss of damage caused by delay in transit. It was held that under this agreement the Company were not liable for loss of market through delay, unless fault was proved against them, and, on the proof, that no fault was proved. That case differs from the present one in respect that there was a special contract. But the opinions of the Court are instructive. Lord President Inglis says: 'Every man who sends fish sends it subject to the risk that the train by which he expects it to go may be so overloaded that it cannot be sent. All the Company undertake is responsible despatch, and the question is whether they used such despatch in this case, or rather, whether it has been proved that there was unreasonable detention, or that the arrangements of the Company were so made as to produce unreasonable detention.'

"In the case of *Macdonald v. Highland Railway Company*, 20th May 1873, 11 Macp. 614, the pursuer sent by railway some goods marked 'perishable.' The goods were put into a truck which was not marked 'perishable,' and were not forwarded by the first train in ordinary course, but were detained at Dingwall Junction, and not sent forward till next day, too late for the steamer they were meant to catch. The Court held that the Company 'neglected and failed to forward the goods with reasonable expedition, in respect, according to ordinary

practice, perishable goods are sent on preferably to goods not perishable, whereas goods not perishable were, on the occasion libelled, sent on in preference to those of the appellants,' and that in consequence the pursuer had suffered damage for which the Company was responsible. The ground of judgment there seems to have been that the goods were damaged by the detention; and the Company, knowing the nature of the goods, ought to have given them a preference over goods not perishable if the train was unable to take all the goods.

"In *Anderson v. North British Railway Company*, February 1875, 2 R. 443, where a Railway Company which had been used to run a fast goods train by which dealers could send meat and live stock to a market town in time for the market without any special rates, failed on one occasion to carry a lot of pigs in time for the market, in consequence, they alleged, of excess of other traffic, the Court, on the ground that no sufficient cause of delay had been proved, held the Company liable for the loss of market; while, in another branch of the case, they assolized the Company, where the delay was caused by a railway accident, for which it was not shown that the Company was responsible.

"In *Macconnachie v. North of Scotland Railway Company*, 6th November 1875, 3 R. 79, the Company gave consigners of fish the option of having their goods carried at a low rate on condition of the consigners relieving the Company of all liability for delay, except upon proof that the detention arose from the wilful fault or negligence of the Company's servants. In an action of damages for detention of two consignments of fish, the Court found the Company liable, the judgment bearing that when they received the goods they knew that owing to an accumulation of traffic at one of their stations, the goods were liable to be blocked in their transit, and that in fact two blocks did take place; the delay being thus occasioned by the fault and neglect of the Company in not sufficiently providing for the due transmission of the goods. Lord Justice-Clerk Moncreiff, in his judgment, says: 'Temporary or accidental detention from unexpected pressure of traffic is a risk incidental to railway transit, and one of which the customers must to a certain extent take their chance. But it is quite a different thing when the causes of probable detention are known and foreseen, and are not specifically disclosed to the customer when his goods are accepted.'

"I think the principle applicable to the present case, which may be gathered from these decisions, is that where, in the absence of any special contract, goods entrusted to a carrier for through transmission are detained on the way, the carrier will not be held liable for loss of market unless fault is proved against him. In the present case, I think fault has not been proved against the defenders. Assuming, as I do, that the cause of detention of the barrels was that the steamer *Buda* was full, there is no proof that that contingency could or ought to have been foreseen by the defenders. On the Saturday in question an unusually large amount of herrings was received at Leith for transhipment. The *Buda* was, no doubt, pretty full loaded with other material before the barrels arrived. Unfortunately for the pursuer, his barrels were the last for transhipment, and it was impossible, late on Saturday afternoon, to discharge part of whatever imperishable cargo there may have been on board to make room for the pursuer's barrels. The defenders appear to have done all that in the circumstances they could necessarily be expected to do. They sent word to the pursuer on the Monday morning that his fish had been detained, and gave him the option of sending them to Hamburg on the following Wednesday, or of waiting for the Stettin steamer on Saturday the 15th. The pursuer declined to interfere, so the fish were sent to Stettin on the Saturday. There is no proof that they were in any way injured by the detention. The price they realized may have been less than the prices of the previous week, but that loss must, I think, in the circumstances, fall on the pursuer."

The Sheriff found pursuer liable in the modified expenses of £2, 2s. to the defenders.

Act. Sutherland—Alt. Cormack.

Notes of English, American, and Colonial Cases.

SLANDER.—*Slander of title—Rival patentees—Absence of mala fides—Damages—Injunction.*—To support an action for damages in the nature of an action for slander of title, it is not enough, when the defendant has property of his own in defence of which the alleged slander is uttered, that the statements should be injurious and untrue, but there must be something from which the Court can infer an intention on the part of the defendant *mala fide* to injure the plaintiff.—*Halcy v. Brotherhood* (App.), 51 L. J. Rep. Ch. 233.

The plaintiff, who was a manufacturer of steam engines and a patentee, by his statement of claim alleged that the defendant, who was a rival manufacturer, and also a patentee, had during a course of years injured the plaintiff's trade by systematically threatening with legal proceedings persons proposing to deal with the plaintiff. The defendant had not followed up his threats by actually taking any legal proceedings, but the plaintiff did not allege that the threats were made otherwise than *bona fide* in defence of the defendant's supposed rights as a patentee. The action was framed as an action for damages, but the plaintiff amongst other relief asked for an injunction. At the trial of the action, JESSEL, M.R., without going into evidence, gave judgment for the defendant in the nature of a nonsuit. On appeal,—*Held* (affirming the decision of JESSEL, M.R.), that as the allegations in the statement of claim contained no charge of *mala fides*, they were not sufficient to support an action for damages; and that, as they contained no charge that the defendant threatened and intended to continue the course of conduct complained of, they were not sufficient to support an action for injunction. *Held* also (affirming the decision of JESSEL, M.R.), that as the action was framed as an action for damages, it was not convenient to have it turned into an action for an injunction by giving leave to amend.—*Ibid.*

Wren v. Wield (38 Law J. Rep. Q.B. 327; Law Rep. 4, Q.B. 730) approved.—*Ibid.*

CHEQUE.—*Overdue draft—Rights of bona fide holder.*—The rule of law that the holder of an overdue bill of exchange or promissory note payable at a fixed date has it with the same title, and no other, as the person from whom he receives it, has no application to cheques. The mere fact, therefore, that a person is the holder of a cheque eight days after its date does not of itself place him in the position of a taker at his peril, so as to make him stand in the same position as the person from whom he receives it. The proper question for the jury in such a case is, whether the cheque was taken under such circumstances as ought reasonably to have created suspicion that it was in any way tainted with fraud.—*The London and County Bank v. Groome*, 51 L. J. Rep. Q.B. 224.

Down v. Halling (4 B. & C. 330) explained and distinguished.—*Ibid.*

PUBLIC LIBRARIES ACT (18 and 19 Vict. c. 70, s. 6)—*Public meeting of rate-payers—Common law right to demand poll*—40 and 41 Vict. c. 54, s. 1.—Any qualified person present at a meeting called under section 6 of 18 and 19 Vict. c. 70, to consider whether or not the Public Libraries Act shall be adopted for a district, has a right, when the sense of the meeting has been obtained on a show of hands, to demand that a poll be taken; and the right to a poll, which exists at common law, has not been taken away by 40 and 41 Vict. c. 54.—*Reg. v. The Wimbledon Local Board* (App.), 51 L. J. Rep. Q.B. 219.

FRIENDLY SOCIETY.—*Preferential debt—Bankruptcy of treasurer—Friendly Societies Act, 1875* (38 and 39 Vict. c. 60, s. 15, sub-s. 7)—*Bankruptcy Act, 1869, s. 32.*—Under the Friendly Societies Act, 1875, s. 15, sub-s. 7, the trustees of the society are entitled to preferential payment out of the estate of a bankrupt treasurer in respect of money received by him by virtue of his office, notwithstanding the fact that the debtor's assets consist only of stock-in-trade, furniture, and other property, which cannot be considered as specifically belonging to the society.—*In re Atkins; ex parte Edmonds*, 51 L. J. Rep. Ch. 406.

LIBEL.—*Privilege—Public policy—Society to suppress mendicity.*—A society established for the suppression of mendicity published a libellous report of the plaintiff. The report was prepared for and communicated to persons who made inquiries of the society respecting the plaintiff with the view of assisting her or of recommending her to others. In an action by the plaintiff against the society for damages for the libel contained in the report,—*Held*, that the report, having been published in the discharge of a moral and social duty, was privileged.—*Waller v. Loch* (App.), 51 L. J. Rep. Q.B. 274.

THE JOURNAL OF JURISPRUDENCE.

MR. FOSTER AS A SCOTTISH GENEALOGIST.

THERE is a time, we are told, for everything; the time has now arrived, we think, when we must speak out without fear or favour. Scotsmen have got into a habit of receiving with a kind of amused wonder all the extraordinary assertions made about their country and themselves by persons whose conceit in general is only equalled by their ignorance. In most cases there is no great harm done, but when a distinguished officer of the Crown in Scotland is persistently held up to obloquy, and our other record scholars, past and present, are alluded to with sneering contempt, by one who loudly asserts his own superior intelligence, it becomes our duty to inquire who this traducer is, and what real acquaintance he has with the subjects in which he professes himself an expert.

Mr. Joseph Foster's *Annual Peerage and Baronetage*, which has just reached a fourth edition, occupies, if its author's reiterated averments are to be credited, an immeasurably higher standpoint than any previous compilation of the kind. It is, however, by no means Mr. Foster's only genealogical performance. A volume of *Royal Descents*, to be published by subscription, was some time since heralded by an advertisement that the author was willing to investigate the pedigrees of all persons who have reason to believe themselves to be descended from the blood-royal, and that "the fictitious and erroneous descents found elsewhere will be omitted." How far this undertaking has advanced we know not. A periodical called *Collectanea Genealogica*, edited and principally written by him, appears at somewhat erratic intervals, whose purpose is best described in the author's or editor's own words:—

"Having pledged myself to raise my *Peerage and Baronetage* to a standard of excellence never as yet attained by any similar works, and having also commenced the compilation of a series of royal descents, it will be a surprise to

some of my patrons that I have now undertaken in addition to edit a monthly publication, although it is generally allowed that the proposed contents are destined to prove of the greatest importance to the genealogist and the historian by placing at their disposal an invaluable array of facts, all which would require Briareus his hundred hands, Argus his hundred eyes, and Nestor his century of years to marshal."

"These be brave 'orts," and the reader will have an opportunity of judging whether the performance has been commensurate to the promise. In arranging the births, marriages, and deaths in the *Gentleman's Magazine*, Mr. Foster undertakes a useful service, requiring care and accuracy, but neither scholarship nor historical knowledge. The publishing of the marriages in Gray's Inn Chapel is of more questionable utility, the entries for the most part relating to persons in a very humble sphere of life. A portion of the *Collectanea* consists of attacks on various public officers, genealogists, and other persons who have, in one way or another, become obnoxious to the editor, couched, we are sorry to say, in language which, to use a very mild phrase, is in the worst conceivable taste. The present officers of arms of Scotland and Ireland, more particularly the former, are the subjects of the most frequent and determined attacks. Their ignorance, malversations, and delinquencies are of so deep a dye as imperatively to call for their removal. "When the offices of Lyon and Ulster were made Government departments, they should have been made adjuncts of the Heralds' College, which would have treated their business with the same careful scrutiny as their own" (*Collectanea*, pt. viii. p. 23). Nor do the Scottish record scholars of the past find more favour in Mr. Foster's eyes, as may be seen in his preface to his *Scottish Members of Parliament*, a work regarding which we shall have more to say by and by. Let us note the terms in which he allows himself to speak of the monuments of scholarship, industry, and research which the Thomsons, Inneses, Chalmerses of Aldbar, Robertsons, Stuarts, and Laings, lately passed away, have left behind them, and to which a Stevenson and a Skene, still alive, have contributed, namely, the works of the Maitland, Bannatyne, Spalding, and other Clubs. Every Scotsman knows, and few educated Englishmen are entirely ignorant, how the labours of those great scholars have brought to light and preserved a mass of the most valuable matter from private charter chests and public and private repositories of various kinds, their labours including the editing of eighteen monastic and four episcopal Chartularies, and of numerous manuscript chronicles of the highest interest, besides producing the three volumes of the *Origines Parochiales Scotiae*, the conjoint labour of Mr. Cosmo Innes, Mr. Joseph Robertson, and Mr. Brichtan, beyond measure precious as an authentic documentary account of the antiquities, ecclesiastical and territorial, of about one-half of Scotland. It is to these and such like works that Mr. Foster adverts in the following language:—

"Those great club societies, the Roxburghe, the Maitland, and the Bannatyne, who might have edited and printed so much valuable material, have practically missed their mark by catering for the powerful few instead of the majority of the nation. How much more might have been achieved by the publication on some definite plan of wills, charters, registers, etc., and better even than parish registers would be the registers of the students of the learned professions. . . . Such a work when once done would indeed be a joy for ever."

The extent of Mr. Foster's acquaintance with these books is shown by his ignoring in his enumeration both the Abbotsford and Spalding Clubs, and including the Roxburghe, an altogether English society, established, not for the illustration of history, but for the printing of literary rarities. The club books, while they are the delight of the real scholar and student of genealogy, unfolding as they do the local and general history of Scotland in the past, do not—fortunately perhaps—lend themselves so readily to the purposes of the bookmaker as Wood's *Douglas' Peerage*, or as the humbler style of works would have done, in which Mr. Foster regrets that our Scottish record scholars did not employ themselves.

Mr. Foster, however, acknowledges as exceptional to the prevalent barrenness of Scottish historical and genealogical literature, "the record publications now in progress, *e.g.* *The Great Seal Register*, *The Privy Council Register*, *The Exchequer Rolls*, etc.; but as these principally refer to the fifteenth century, they can only throw light on a small part of the period embraced." We fear Mr. Foster knows little more about the books which he praises than the books which he condemns. We are curious to know whether he would have penned the sentence last quoted had he been aware that the editor of the *Exchequer Rolls*, whose name stands prominently on the title-page of each volume, is the same Lyon King of Arms who is his chief bugbear, whose blundering, incapacity, and unfitness for his position he habitually denounces as a crying public scandal. The editing of this important record has unquestionably been a work of considerable difficulty; and the few survivors of the old generation of record scholars have been pleased to express in strong terms their approval of the way in which Lyon King of Arms has achieved this labour. The elaborate prefaces appended to the volumes already issued, as guides to the historical and other students who would thread their way through the mazes of the Exchequer accounts, could not have been written without much knowledge and study of records and charters, and an intimate familiarity with the researches on similar subjects of the past generation of scholars, English, Scottish, and Continental. That Mr. Foster's acquaintance with the other record volumes which he selects for praise is not very profound, is evinced by his calling the *Privy Council Register* a record of the fifteenth century, whereas it only begins in the middle of the sixteenth.

Foster's *Peerage and Baronetage* contains about as much matter

as Burke's. The most distinguishing feature on first opening it is the eccentricity of the heraldic engravings. If these woodcuts do not find favour in the eyes of heralds and kings of arms, they are so quaint and so amusing that we are loath to quarrel with them, though they would undoubtedly be more in place in a "comic peerage" than in a work in which the author ostensibly aims at matter-of-fact accuracy. The peers come first, and afterwards the baronets, in separate alphabets. Then follows an especial feature of the book, called "Chaos," comprising notices of all baronets or *soi-disant* baronets, about whose *status* Mr. Foster is not satisfied. It is well known that the title of baronet has at different times been unwarrantably assumed; and it is most desirable that there should be some more direct mode of repressing such assumptions than exists at present. There are, however, assumptions and assumptions. A Gibb or a Lawson, being unrecognized by the officers of arms, and therefore by the Lord Chamberlain, can at least not be received at Court as a baronet. But there are likewise, particularly in Scotland, a few baronets by recognition of long standing, whose right to that dignity has been occasionally questioned by lawyers and genealogists. To put together these two classes, and to add a few baronets regarding whom some idle gossip has reached Mr. Foster's ears, and—for reasons best known to himself—to class with them several baronets regarding whose *status* not a shadow of doubt ever was or could be entertained, is what Mr. Foster has done; and it is a proceeding in which no one but himself would have expected the countenance or assistance of any officer of arms. Nor does he seem to entertain the smallest idea that this assumption of the functions of a king at arms—for it is nothing else—imposes on him any obligation in the way of carefully investigating the pedigree of the baronets whose rights he denies. The notices of the baronets in "Chaos" are ostentatiously careless and inaccurate, and in the cases where a flaw has been suspected by better informed persons than Mr. Foster, he has evidently not a notion where that flaw is to be sought for. In the case of one well-known and generally recognized baronetcy, where doubts have rightly or wrongly been entertained about the extinction of the issue male of a particular younger son, who, if still in existence, would exclude the present family, Mr. Foster merely condemns the account in Burke's *Peerage*, "so that the more prominent of the weak points may be easily detected;" but we defy any outsider who examines the pedigree either in Burke or in Foster, to form even a guess where the weak point is. Some few baronets are both in the body of the book and in "Chaos;" and it is significantly hinted that if they fail to give Mr. Foster perfect satisfaction regarding their *status*, they will be altogether removed from the former position. One of these is Sir Reginald Cathcart of Carleton, regarding whom Mr. Foster in his "Chaos" says:

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"Further particulars of the births, marriages, deaths, and families of the father and grandfather of the present baronet are much needed to substantiate the pedigree in the baronetage." Considering that the marriage of the father of the present baronet to Lady Eleanor Kennedy in 1836, and his death in 1878, are to be found in the newspapers of the date, that the estates have always descended with the title, that there has never been a remoter succession than from uncle to nephew, and that the retours of the different baronets as they succeeded are in the Chancery Office, open to Mr. Foster's inspection, the paragraph above quoted, with whatever motive it was penned, cannot be called anything but a gratuitous impertinence.

Year by year Mr. Foster waxes bolder; and the preface to the new edition winds up with an expression of astonishment at the audacity of the Scottish Office of Arms in officially acknowledging in the year of grace 1882 a baronet whom he—Mr. Foster—had consigned to "Chaos," an act which, in Mr. Foster's estimation, has filled up the measure of Lyon's iniquities. "I shall be curious," says he, "to know under what designation the Lord Chamberlain will allow Her Majesty to receive this gentleman . . . if he desire to be presented, and whether the Home Secretary will continue to tolerate the vagaries of the Lyon Office."

We must gently remind Mr. Forster that even had he got his proposal for the abolition of Lyon carried into effect, he would have no right to use language of this kind, unless his scheme also included the abrogation of the institution in Queen Victoria Street, and the appointment of himself as Garter Extraordinary, holding *in commendam* the offices of Lyon and Ulster.

"To the lineages and creations of the Scottish peers," says Mr. Foster in the same preface, "considerable attention has been devoted in this edition." If so, the result is disappointing. Looking at the lineages of the Scottish peers, we are struck first of all with their meagreness. Some are condensed from Burke, others from Wood's *Douglas*, but all abridged in so unsatisfactory and fragmentary a way as to be of little use for reference. To take a few random examples from the opening pages. The first head in alphabetical order is "Abercorn." Both Burke's and Foster's *Peerages* give their account of the house of Hamilton under this head. In the former, three pages are occupied with a well-written history of the Hamilton family, in which the title of Earl of Abercorn is traced from the first holder of it to the present day. Mr. Foster devotes less than a page to the same genealogy, skipping over generations, leaving unmentioned many representatives of the family famous in history, and ignoring the second, third, fourth, and fifth Earls of Abercorn altogether, with, of course, the title of Strathbane conferred on the second earl, and afterwards enjoyed

by his brother and his descendants.¹ In "Ailsa," almost the next Scottish peerage in alphabetical order, the pedigree, which takes up two pages in Burke, occupies hardly one in Foster. With all his interest in "Royal Descents," he hurries over three generations at a time, in suchwise as to leave unnoticed one of the most famous royal descents in Scotland, omitting all mention of the marriage of Sir James Kennedy to the daughter of Robert III. Yet the lady in question was not only ancestress of all succeeding representatives of the house of Kennedy, but mother of one of the greatest and best of Scotsmen, James Kennedy, Bishop of St. Andrews, whose beautiful character both as statesman and prelate is one of the brightest reliefs in the chequered page of Scottish history.

But "Abercorn" and "Ailsa" are favourable examples of Mr. Foster. Where he abridges from Wood's *Douglas*, he does so, as a rule, without the smallest idea of the multitudinous and important corrections which modern research has made on the genealogies to be found there; and this is the case even in his accounts of families whose pedigree belongs to national rather than family history. Take, as examples, the genealogies of Douglas (given under "Hamilton") and Mar. We find it gravely stated (p. 338) that William, first Earl of Douglas, married, "3rdly, after 1377, Lady Margaret Stewart, Countess of Angus, sister and heir of Thomas, 3rd Earl of Angus, relict of Thomas, 13th Earl of Mar, and had a son, George, Earl of Angus." Margaret, Countess of Angus and Mar, it has long been well known, was not wife of the first Earl of Douglas, and could not have been so. She was the wife of his wife's brother; and the connection between them was not only illicit, but, in the opinion of the age when they lived, incestuous. The son who was the issue of that amour did not succeed to, but had a grant from the Crown of, his mother's earldom of Angus.

As to "Mar," we do not ask whether Mr. Foster believes or disbelieves in the continued existence of the ancient earldom. His utterances on this subject, as on most others, are strangely discordant and inconsistent; and we think few people will attach much weight to them. But the Erskine and the Mar genealogies, and the connecting links between them, have been so much canvassed and written about during the last twenty years, that Mr. Foster might without much difficulty have acquired some knowledge of the facts admitted on all sides. He certainly no longer affirms, as he did in his edition of 1880 (*Baronetage*, p. vi.), that Sir Charles Erskine of Cambo, Lord Lyon, was "ancestor of the Earl of Mar and Kellie." But he falls into every absurd and obsolete blunder that is to be found in Wood, with the exception of one, which also he has adopted in every edition till the present

¹ He differs from Burke in making the date of the Irish baronetcy conferred on Sir George Hamilton of Nenagh, 1662 instead of 1660: a matter as to which we cannot but think Ulster likely to be better informed.

one, and now devotes a footnote to correcting, as if there was a risk of any mortal believing it at this time of day. At the same time, his correction is only half a correction. Mr. J. P. Wood was ignorant of whose daughter, and whose widow, "Beatrix Lindsay," wife of Sir Robert Erskine, was, ay, and of what distinguished personage she was mother by her former marriage,—three subjects regarding which Mr. Foster shows himself to be in equally profound ignorance. Advancing to the next generation, Mr. Foster says:—

"Sir Thomas Erskine . . . m. 1st, Johanna Barclay, and, 2ndly, the above-named Janet, only child of Sir Edward Keith, Marischal of Scotland."

Had Mr. Foster had the most superficial acquaintance with the "Mar case," he would have known that the wife of Sir Thomas Erskine (for he had only one) was not daughter of the Marischal; nor were Johanna Barclay and Janet Keith distinct entities, but one person. Johanna or Janet Keith was daughter, not of Sir Edward Keith, the Marischal, but of another Sir Edward Keith, and she married, first, Sir David Barclay of Brechin, and, after his death, Sir Thomas Erskine.

But Mr. Foster, in the already-mentioned preface to his *Peerage* of 1883, enumerates two instances where he has been enabled to correct the accepted accounts of peerages of Scotland:—

"I may instance, as typical of the revisions I have effected, the pedigrees of Tweedmouth, of Ruthven, and of Sinclair. In the first of these cases I have been compelled to impugn, and, after careful investigation, to reject an official pedigree proved and registered in the Lyon Office of Scotland. My reasons for doing so will be found elsewhere; and having there disproved the fictitious generations, I have in this edition entirely ignored them. The second case is typical of the shortcomings, not of present, but of past Scotch genealogists. A barony created by Charles II. has been either wilfully grafted on to, or carelessly confused with, a coronation (or courtesy) barony of George I. and George II. I have in this edition pointed out how erroneous is the account in Wood's *Douglas*, and have separated the original and genuine dignity from the later and questionable title. It is to be hoped that this may invite attention to the unsatisfactory *status* of the Barony. In the third case I have made considerable changes in the lineage as hitherto recorded, and have carefully separated the present line of peers from the earlier and distinct line of Sinclair, whose title they so strangely bear. I have also here corrected a prevalent misconception, arising from ignorance of the law of treason."

Why a recently-created peerage of the United Kingdom like Lord Tweedmouth's should be coupled in this passage with two Scottish peerages, is hard to say. We may, in passing, remark, that we have no particular objection to the genealogy of Lord Tweedmouth as given in the body of this work; if the generations which Mr. Foster calls "fictitious" do not appear, neither does the counter pedigree which Mr. Foster in his *Collectanea* proposed to substitute for them.¹ But Mr. Foster's assertion regarding the

¹ The coexistence of three separate recorded Marjoribanks pedigrees in the Lyon Register, all discrepant and all faulty, was the subject of two papers in

Ruthven peerage is beyond measure startling, and that not to the peerage lawyer or genealogist only. A Scottish barony created by George I. seven years after the Union, and that by writ of summons to his coronation, is a novelty alike to Scottish and English readers. That a Scottish peerage is meant, is put beyond doubt by Mr. Foster's further contention that, in consequence of the English doctrine of the indefeasibility of peerage not obtaining in Scotland, the title did not properly transmit to the descendants of the lady made a peeress by George I., who nevertheless wrongfully assumed it (p. 611). English peers were in early days created by writ of summons to Parliament, but never by writ of summons to a coronation. Scottish peers were never created by writ at all. If George I. so far violated the constitution of Great Britain as to create a Scottish peeress, it would hardly have been reserved for Mr. Foster to find it out. That the ordinary printed accounts of the Ruthven peerage are not quite trustworthy is true; and had Mr. Foster, with but a little preliminary knowledge, betaken himself to the proper source of information, the Scottish records, he would have readily been able to correct them.

Sir Thomas Ruthven of Freeland, when raised to the peerage as Lord Ruthven in 1651, had a grown-up and unmarried son David, who succeeded him, and three daughters,—Anne, Elizabeth, and Jean,—the youngest of whom, though in Wood's *Douglas*, Mr. Foster omits. The patent, which was unrecorded, was burned with the house of Freeland in 1750; and it is from collateral evidence only that we can gather what its terms were. The death, unmarried, of the second Lord Ruthven in 1701, and the retention of the title on the Union Roll, with other facts which need not be particularized, indicate that its limitation was wider than to heirs male of the body. But was it simply limited to heirs of line, or did it contain, like a good many other Scottish patents about its date, a power to the patentee, perhaps to his son also, to select an heir; or was there an express limitation to the heir or class of heirs on whom Lord Ruthven should entail his estates? Be that as it may, David, Lord Ruthven, and his sisters acted as if the patent had contained some provision such as we have suggested. Lord Ruthven entailed his estates, in terms indicative of his belief that

the *Collectanea*, written in Mr. Foster's peculiar style. The two pedigrees most objected to turned out, however, not to be Lyon Office pedigrees at all; and the issue became narrowed to the question whether "James Marjoribanks, who was undoubtedly son of Thomas Marjoribanks" (a Lord of Session in the sixteenth century), was identical with "James Marjoribanks, who was undoubtedly Lord Tweedmouth's ancestor" (*Collectanea*, pt. viii. p. 63), an identity which Mr. Foster affirmed "is capable of disproof absolute." This disproof was (as further explained on p. 66) to consist of the proof of a counter proposition that Lord Tweedmouth's said "undoubted ancestor" was son, not of the judge, but of one Simon Marjoribanks,—a position which, *when* Mr. Foster succeeds in satisfactorily establishing it, will of course set the matter at rest. The point is one of little interest to genealogists.

he was entailing his honours with them, first on his youngest and favourite sister Jane; failing her and her issue, on Anne, his eldest sister, wife of Sir William Cunningham; and next, on the issue of his second sister, who had married her kinsman, a Ruthven. Jean, the youngest sister, as *Lady Ruthven*, was retoured heir to her brother, and generally recognized, as his successor in his peerage as well as his estates; and, like every other Scottish peer and peeress, she was summoned to the coronation of George I. She never married; and a few months after her death, the issue of her eldest sister having failed, we find the daughter of the second sister in enjoyment of the title; whose *status*, inasmuch as she was both heir of line and heir of entail (or nomination), was, so far as we can see, beyond legal doubt, as we also infer is that of the later Lords Ruthven, her descendants.

Mr. Foster's discovery regarding the Sinclair peerage is another surprise to us, but of a different complexion. The view which he sets forth as novel is familiar to every Scottish genealogist and peerage lawyer. It was first propounded by Mr. Riddell in his *Peerage Law* (pp. 54, 55). A Scottish peerage, it is well known, was often resigned to the king to be reconveyed to a new series of heirs, who might even be strangers in blood: a transaction completed by a Crown charter of resignation or confirmation. Resignation was a necessary step to divest the original heirs of their right, and the fact of the resignation having been made was generally narrated in the Crown charter, the only known exception, if it be one, being the case of Lord Sinclair. John, Lord Sinclair, who had no son, but a daughter married to Sinclair of Herdmanstoun (very remotely, if at all related to her), executed a "designation" of his estates and honours to his son-in-law, bringing in the paternal relations of the latter under a remainder which took effect in the next generation. There is no positive evidence that there was a "resignation" as well as a "designation." The "designation" was, in 1677, confirmed by Charles II. to the grandson (by his daughter) of the designer, the confirmation charter making no explicit mention of a resignation, though conferring the precedence of the old title. The question raised by Mr. Riddell was, whether a resignation not narrated in the Crown charter could be presumed to have taken place. If not, the dignity conferred in 1677 was a new one, and the old title, which had never been extinguished, still existed, agreeably to the old Scottish presumption in favour of heirs general, in the person of the heir of line. That Mr. Foster must directly or indirectly have got this view of the case from Riddell's work and not from an independent examination of the Scottish records, is obvious from the circumstance, that in quoting the charter of 1677 he adopts all the little differences of spelling from the register which are to be found in Riddell's quotation—our great peerage lawyer was not always punctilious in his orthography. The matter has since been much discussed, the upholders of Lord

Mansfield's *Cassillis dictum* maintaining that the old peerage had come to an end on the death of the Lord Sinclair who executed the designation, in consequence of the failure of heirs male, as, according to their theory, no right could be presumed to exist to it in the person of an heir female. Fourteen years after writing his *Peerage Law*, Mr. Riddell, we have reason to know, still looked on the question as one of extreme legal difficulty. Though it is but natural that a Foster should rush in where a Riddell fears to tread, we would hardly have expected to find Mr. Foster posing as an adherent of the "extreme views of Riddell and his Scottish school."¹

Passing for a moment from Scottish to English instances, we find to a certain extent the same characteristics. Take three well-known titles which immediately succeed each other, "Derby," "Devon," and "Devonshire," the pedigrees are imperfect, scrappy, and discontinuous. Little more than a page is appropriated to each, while Burke allots three pages to the two former, and two to the last.

How then, the reader naturally asks, does it come to pass that Mr. Foster's annual volume is as large, and contains about the same amount of letterpress, as that of Burke? Chiefly by this means. There is a certain limited number of peers and baronets, whom Mr. Foster treats in an entirely exceptional manner, filling page after page with all that can be discovered of their genealogy, and giving a full account of their remotest cousins, every conceivable female line of descent being traced. Contrast, for example, the meagre lineages just alluded to of the important and interesting families of Courtenay, Cavendish, and Stanley, with the pedigree of Lord Carrington, which, though highly

¹ Any one familiar with Scottish family history, going over the accounts of the Scottish baronets not in *Chaos*, must be struck with a slipsbod carelessness about detail, and an absence of minute accuracy, such as would hardly have been expected from one "more conversant with Scottish genealogy than the authorities of the Lyon Office." To take as an average example the genealogies of three different families of Campbell, which follow each other in order. On p. 102, James Campbell of Aberuchill, father of Sir Colin, 1st baronet, who was unquestionably dead in November 1640, is said to have fallen at the battle of Worcester, which was fought on September 3, 1651. On p. 103, James Campbell, who died 1777, the first ancestor mentioned of Sir Guy Theophilus Campbell, is said to have married "Jean, second daughter of Stirling of Herbertshire and Keir." The identification of the Stirlings of Herbertshire with those of Keir at that period will surprise, not Scotchmen only, but Englishmen. The Stirlings of Herbertshire were a distinct family as far back as 1509, and were not cadets of Keir at all, but of Cadder. Again, on the same page, Susan, fifth daughter of Sir Ilay Campbell, is said to have married "Crawford Tait of Harviestoun and Cumloden, county Clackmannan." The marriage alluded to is, of course, well known, one of the offspring having been the late lamented Archbishop of Canterbury. Cumloden, however, is in Galloway, not in Clackmannanshire, and Mr. Crawford Tait never owned that estate, his only connection with it being that his mother was a Murdoch of Cumloden. We have hardly found a single genealogy in the *Baronetage* in which similar blunders do not meet the eye.

respectable, cannot be called distinguished. It occupies nearly four times as much space as that of any of these famous houses. We have elaborate separate pedigrees under the heads "Smith of Woodall," "Smith of Sacombe," "Smith of Selsdon," "Smith of Dale Park," "Smith-Dorrien of Haresfoot and Dorrien-Smith of Tresco Abbey," "Smith of Edwaltoun," "Pauncefote of Preston," etc.

Among baronets the same thing is still more obvious. A few lines are thought sufficient for the Claverings, one of the most historically interesting families in England, to whom Sir Bernard Burke assigns a page—quite small enough space. But we have all the relations of the Peel family, near and remote, by male and female descent, worked out similarly to the Smiths. We have "Peels of Trenant," "Peels of Knowlmere," "Peels of Stonehall," "Peels of Underrock," and "Peels of Brookfield," all arranged under separate heads. On the other hand, Sir Bernard Burke's single page, made up of a brief notice of the descent of the first baronet, and concise accounts of the various Peels who are in remainder to the baronetcy, and their issue, contains all that is necessary. Similarly, the account given by Burke of a recently created baronet, Sir Joseph Pease, takes up not quite half a column. Mr. Foster, on the other hand, gives in the most formidable detail, not only that baronet's remotest relations on the father's side who can be traced, but genealogies of Backhouses and multitudes of other highly respectable Quaker families, whose sole reason for being there is their claiming cousinhood, more or less distant, with Sir Joseph. Now much of the contents of these articles (provided they be more correct than Mr. Foster's Scottish information) would be entirely unobjectionable in a privately printed or even published monograph. But in a professedly national work, which appeals for support to the general public and not to a select body of subscribers, they are decidedly objectionable, as crushing out matter of general interest and historical importance.

But we are bound before concluding to say something about a work in which Mr. Foster has, even more than elsewhere, vaunted his pretensions as a Scottish genealogist; we mean his *Alphabetical List of the Members of Parliament of Scotland*.

In pursuance of two Orders of the House of Commons in 1876 and 1877, an official return was compiled of the members of Parliament for the three kingdoms from the earliest times regarding which information was attainable to the present day. The Scottish department down to the Union was entrusted to Mr. Dickson, the curator of the historical department of the General Register House, and could not have been in better hands. Mr. Dickson's record knowledge may be named alongside of that of Thomas Thomson or Joseph Robertson; his punctilious accuracy is proverbial; and as a monument of the extent of his general

learning and research, we need only refer to the 300 pages of Preface prefixed to vol. i. of the *Treasurer's Accounts of Scotland*. His portion of the return is probably as free from error as anything human could be.

No sooner had the Blue-book containing the returns appeared, than Mr. Foster set himself to reproduce it in his *Collectanea* in an alphabetical shape, with its numerous errors corrected, and large genealogical and historical additions. "As it is urged," he says, "that the index of the Blue-book now in preparation may detract from the value of the work in which I have engaged myself, so it is my intent to show, if possible, why I very much doubt that it will do so, and why, even under the most favourable circumstances, it is unlikely to be as useful to the historian and the public as was generally anticipated." The reason given is that the researches of himself and his friends have discovered in the Blue-book three misspellings, three inaccuracies, and two omissions, all of which he condescends on in order to show that he is not speaking at random. The misspellings are Boyne for Doyne, Cook for Coote, and Reresford for Beresford; misprints to be regretted, no doubt, though in the eyes of a less fastidious person than Mr. Foster they would hardly have been held to vitiate the whole returns. "The authorities," he says, "may well lose confidence in their index, feeling that even at the best it cannot be accepted as conclusive."

Mr. Foster has done us the honour to begin with the Scottish members, his account of whom is now complete, and to be had, "with corrections," separately from the *Collectanea*. "The Scottish members," he says, "are in some respects so unsatisfactory as to form the least favourable commencement of the series." The few errors, we may remark in passing, which he, or rather his friend Mr. Beavan, has detected, are in the portion of the return posterior to the Union, which was prepared in England, and consist of comparatively venial slips in the orthography of Scotch names.

"As this publication," Mr. Foster says in his prospectus, "will doubtless rank as a standard work, it is proposed to insert genealogical and biographical notices of the present and late members, *especially for those who may subscribe to the work*, and for that purpose early contributions should be transmitted."

We think we are not wrong in saying that it is easy to tell at a glance who of the now living members or ex-members of Parliament are, and who are not, subscribers. Lord Mure (who comes in as having been member for Bute) is decidedly a non-subscriber. He is *filius nullius*, and has an only child, a daughter; an assertion which, we fear, will be received with a certain measure of incredulity in the Parliament House. On the other hand, the member for the Kilmarnock Burghs is a subscriber, as a minute account is given of his forbears and his family; though our faith is sorely tried by the information that he had a son born on 27th

March 1859, and a daughter born on 27th April 1859. Another subscriber, the ex-M.P. for the Stewartry of Kirkcudbright, was, we are told, born in 1841, and admitted to the bar in 1685.

If even living subscribers meet with treatment like this, laxity of dates is to be looked for in the accounts of past generations of Scottish members of Parliament. On p. 215 we find that Patrick Lindsay, Lord Provost of, and afterwards member of Parliament for Edinburgh, died on 17th February 1753; that sixteen years later, on 7th May 1769, he married a third wife, and that the said lady died on 20th April 1769, a fortnight before her marriage. When, as sometimes happens, the date of a death is twice given, it is as likely as not to be different each time. Charles Oliphant, member for the Ayr Burghs, is said to have died on "9th January 1719-20," and in the very next line the date of death is repeated as 9th December 1719. Similarly, the date of death of General Skene of Hallyards is on page 317 first put down as 6th July 1787, and then repeated in the succeeding line as May 1787. Such-like inaccuracies tend to shake our faith even in the author's index to the *Gentleman's Magazine*.

Yet more reprehensible are the false identifications with which the book abounds, which are none the less blameable that they are sometimes introduced with the qualifying adverbs "possibly" or "probably." Whenever a commissioner for a burgh bears a surname which also belongs to a baronial family, it may be in a very remote part of Scotland, he is immediately set down as either the head of that family or a younger son. In reality, the commissioners for the burghs were always burgesses of the towns which they represented; the most considerable citizens being generally chosen, the choice, however, occasionally falling on a neighbouring laird, who was a burges, and perhaps also a trader in the town, and was interested in its welfare.

To take an example, patronymics like Anderson, Robertson, Williamson or Wilson, Johnson, Jameson, Thomson, and Henryson or Henderson, were from the fourteenth century downwards extremely common among our burgesses. Henderson was, however, also the surname of a well-known and still existing baronial family in Fife. On turning to the name Henderson in Mr. Foster's list, we find nearly a page of Hendersons, all of whom are either certainly, probably, or possibly, identified with a Henderson of Fordel, or with a brother of the laird of Fordel. As some of these Hendersons are commissioners for burghs very far indeed from Fordel, and the Scottish records make mention of numerous Hendersons among the burgesses of Aberdeen, Arbroath, Edinburgh, Jedburgh, Linlithgow, Lochmaben, and other towns, it is obviously only the wildest fancy that could conjure up such an association. George Henderson, commissioner for Edinburgh in 1543, is "possibly identical with George Henderson of Fordel." John Henryson, a bailie of Lochmaben, and commissioner for that

burgh in 1645, is identified not possibly or probably, but certainly, with Sir John Henderson of Fordel, 1st baronet. We would have thought it a much more likely guess that he was a descendant of John Henderson, a burgess of Lochmaben, who figures in the Crown account of the Steward of Annandale in 1459. Master Robert Henderson of Holland, commissioner for Orkney and Shetland in 1617, who in reality belonged to a well-known family of Hendersons in Shetland, is "possibly identical with Colonel Sir Robert Henderson, brother of Sir John, Sir James, and Sir Francis, sons of James Henderson of Fordel," and so on. In like manner, John Dick, commissioner for Queensferry in 1646, 1647, and 1649, one of a well-known burgess family who were again and again provosts of Queensferry, is "possibly son of Sir William Dick, and brother of John and Andrew Dick." Our readers have but to turn over a few pages of the book to find out multitudes of similar statements; in fact, the identifications are seldom right, except in the case of prominent judges, statesmen, or baronets, whose pedigree is to be found in the commonest books of reference.

In a carefully written criticism of a portion of this work, which appeared in *The Genealogist* (vol. vi. p. 200), the reviewer cited a number of instances of the like misidentifications, and also took Mr. Foster to task for giving a fresh currency to ridiculous fables that were to be found in long discredited books, *e.g.* a statement which must have had its origin either in a hoax, or in the misapprehension of some very illiterate person, that Sir Gilbert Elliot was created a Knight Banneret by Charles I. at the "battle of Scone" in 1643. Every Scottish schoolboy knows that there never was such a battle, and that Charles I. had two years previously to its supposed date left Scotland. How, it will be asked, did Mr. Foster meet these charges, which were surely as serious as the misprints in the Blue-book? Partly by the adjectives "pedantic," "trivial," "flippant"; but principally by his favourite manœuvre of discharging a flood of offensive language at the reviewer. The critic was identified, not possibly, nor yet probably, but certainly, with Mr. Stodart of the Lyon Office; and the reply to the review was the first of a series of invectives by Mr. Foster against the Lyon King of Arms, the Lyon Clerk Depute, and Scottish genealogists generally, of which one of the latest specimens is the preface to his *Peerage* of 1883.¹

Had Mr. Foster professed to be no more than an ordinary book-maker, we would not have devoted an article to him. But when he places himself on a platform above all other genealogists, speaks *ex cathedra* on Scottish history, national and local, asperses the Scottish officers of arms, throws contempt on their proceedings, and

¹ Nevertheless, in the re-issue of his *Members of Parliament*, already alluded to, many of the corrections have been adopted, and even the battle of Scone and its hero have disappeared.

urges their removal as incompetent ; when, on the ground of a few misprints, he condemns a carefully framed House of Commons return as unworthy of credit ; when he likewise condemns a carefully prepared report of a House of Lords Committee on the Peerage of Scotland, of which Committee Lord Moncreiff was chairman ; when he alludes in a sneering tone of superiority to the evidence given before that Committee on subjects which the witnesses had made the study of their lives,—we have naturally asked, Who is Mr. Foster ? and what evidence do his *Peerage* and other books give of his being entitled to assume such an attitude ? And we are now in a position to answer these questions.

In the first place, a compilation which devotes so disproportionate a space to the family history of subscribers or supporters that matters of general interest have to be condensed into the narrowest limits possible, cannot be called a great national work. Secondly, Mr. Foster's rash identifications and carelessness about dates show that accuracy is not a quality with which he can be credited. Thirdly, Mr. Foster hardly knows anything about the genealogy of our historical families beyond what he has gathered from Wood's *Peerage*, a book far behind the critical scholarship of its day (1812), not to speak of that of the present time. He alludes with disparagement to the labours of Scottish record scholars for the last fifty years, and also habitually displays his ignorance of them ; nor is any evidence to be found of his having ever made a search in the Scottish records except once, and that in the hope of being able to trip up Lyon. He makes blunders in history of which a Scottish schoolboy would be ashamed ; he is in the dark as to what a "service" is ; and the measure of his acquaintance with Scottish peerage law is shown by his considering the creation of a Scottish peeress by George I., and that by a writ of summons to his coronation, quite a matter in ordinary course.

It would be an insult both to Lyon and to Mr. Stodart were we gravely to set about vindicating them from aspersions proceeding from such a quarter. Mr. Burnett's intimate knowledge of the duties of his office, and careful and conscientious performance of them, are as well known as his extensive acquaintance with Scottish records, local history, and peerage law. Mr. Stodart, besides being deeply read in the byways of genealogy, English and foreign as well as Scottish, is the author of a standard work of sterling merit on Scottish heraldry and family history ; and to all frequenters of the Lyon Office he is famed for exactly the opposite quality of the "churlishness" ascribed to him in Mr. Foster's preface to his *Members of Parliament*.

LAWYERS' SOULS.

To narrow-minded mortals there may seem to be something of novelty in the very suggestion that a lawyer may after all have a soul, and some such may even be inclined to suggest that the average lawyer would find such a possession an exceedingly inconvenient companion. Others, again, who take a less prejudiced and more matter of fact view of things, may be disposed to object that the souls of lawyers do not differ in any essential particular from the souls of other men,—in fact, that “lawyers’ souls” is a subject as incapable of special treatment as “lawyers’ ribs.” Now, as a patriotic member of the profession, not destitute of certain personal aspirations after the ideal, I must repudiate with indignation the former most vulgar suggestion, that a lawyer is “a soulless thing.” The second ground of criticism suggested is perhaps more formidable, but my answer to it is this. If there be one fact upon which modern science lays stress, it is, that we and all other beings are the creatures of our surroundings, or, to use the orthodox expression, of our “environment.” Now, if, as we are taught, by our surroundings we are moulded and fashioned, and, indeed, in a sense *made*, the difficulty is not what can be the difference, but what can be the possible resemblance, between the soul of an Edinburgh lawyer and the soul, say, of a Morayshire ploughman?

The *Journal of Jurisprudence* is a legal magazine, but it is also pre-eminently a magazine for lawyers: it is the one channel of communication between members of the profession as such, the one organ through which a lawyer can address his professional brethren, and this must be my excuse if in this article I deviate somewhat from the well-worn lines of comment and criticism upon cases, procedure, and legislation, and invite the attention of the profession to some aspects and phases of the life of a lawyer which lie outside the limits of professional work.

It seems not unlikely that under the influence of recent legislation lawyers of all classes will regain in great measure their old position as recognized members of one of the learned professions. Originally an offshoot from the priestly calling, the profession of the lawyer once occupied a position second in popular estimation to none save that of the Church itself; but, from various causes into which I cannot here enter, the profession, whilst always maintaining its old prestige in Edinburgh, sank in the country districts during the course of last century into a somewhat lowly estate. Recent legislation, however, by rendering study at a university necessary, and closing some of the backdoors of the profession, has revived the connection between the practice of the law and our seats of learning, and is daily helping to strip local practice of that intense provincialism which it had once acquired. Nowadays the average lawyer, if he cannot claim to be the equal in culture of the average

clergyman, can at least take his place beside the average medical practitioner. The Church is indeed, if I mistake not, the only profession which imperatively requires a complete course of study at the Arts Classes of the University before entering upon the special training of the profession. In this matter law and medicine are much upon the same footing. In neither is attendance at the Arts Classes of the University (*i.e.* in other words, a liberal education) necessary, but in both provision is made for a certain standard of general culture by the institution of preliminary examinations in general knowledge. All the members of the bar, however, with hardly a single exception, many of the Writers to the Signet, and a considerable number of those who subsequently return to local practice in the country, take out Arts Classes at the University for some sessions. Even in the case of those whose time or whose means do not enable them to do so, and who content themselves, so far as university training goes, with attendance at the classes of Scots Law and Conveyancing, there can be no doubt that residence for two or more winters in a university town, and the breath of university life, exercise upon their minds a most important and healthful influence, enlarging their ideas, dispelling their prejudices, helping them to acquire habits of thinking for themselves, and teaching them what the great world around them is thinking and saying.

Now this is a change which, as one would naturally think, ought in time to revolutionize the position of the lawyer in the social and intellectual world. The good old-fashioned country lawyer of fifty or a hundred years ago was a prosaic enough individual, and undoubtedly he had a right to be so. He left school at fourteen to become an apprentice to his profession in the office of his predecessor, Mr. M'Lachlan, banker and solicitor, since deceased, with just as much Latin as enabled him to spell through a sasine. Physical science was still in its infancy; of mental science, or of any of the other higher branches of thought, he had never even heard, far less troubled his mind or puzzled himself over the problems they suggest; Kant and Goethe had written, but to him their very names were unknown; Darwin was in his cradle, Renan unborn. What call was there upon our good old conveyancer to think for himself? Happy he for whom there were no "obstinate questionings." Was he not an elder of the Church, and regularly in his place there every Sunday forenoon? Who was better able to detect a flaw in a progress of titles? Had he not his Bible, his Erskine, and his fine old Glenlivet?

Now, is that which was good enough for our worthy predecessors not good enough for us also? Were they not useful and respected members of society, as content and happy in their daily round of work and duty as in this world men can well hope to be? Can we look for anything better? Perhaps not; and yet none the less is it so, that we can never hope to stand just where they stood.

What satisfied them can never wholly satisfy us. Our lot may be brighter or it may be darker than was theirs: it cannot be the same. Ours are responsibilities of which they knew nothing. We must rise higher than they did, or else we shall assuredly sink infinitely lower; for our eyes have been opened as theirs never were. We have eaten of the tree of knowledge.

All this may appear somewhat far-fetched and enigmatical, but in truth it is perhaps easier so to express it than to translate its meaning into literal and commonplace speech. Briefly, however, my proposition is this: that whereas there has, during the last thirty years, been a great intellectual and religious upheaval, which has not only given birth to new thoughts, but has made what were once the thoughts of the few truisms to the many, the lawyer, like all other educated men, would have caught some of the contagion even had he spent his youth, as did his predecessors, in the country; but, as it is, his sojourn in a university town has brought him into the very centre of the intellectual ferment. The great problems which perplex thinkers of the present day,—God, immortality, freewill, evolution, and the like,—if they have not been presented to him in the university class-room, have at least been brought home and made familiar to him in the talk of his comrades and the rhetoric of the debating society, and in those books and magazines he has found upon the tables of the reading-room. In one way or another his attention has been called to the fact that these questions have been raised, and that the best minds of our time are working towards their solution. He knows, then, what the issues are; and what to me is an inexplicable riddle, is how in these circumstances he can ever rest, can ever consent to renounce speculative thought, and all search after higher truth, until *for himself* at least these questions have found an answer.

It is quite natural, no doubt, that when the problems are first presented to his mind he should plunge with confidence and enthusiasm into the study of them; natural enough, too, that his ardour should be cooled on the failure of his first attempts towards their solution; but surely it is *not* natural that all interest should evaporate, all effort cease, with the collapse of his youthful enthusiasm. It is not so in other matters. Every one expects to be able to swim when he first takes to the water, but very few desist from all endeavour to acquire the art on discovering that they have been mistaken. Again, the youth rushes with ardour into business, confident that all difficulties will vanish before him, and that he will soon make a fortune. Too often, alas! he soon discovers his mistake; he finds it far harder to make shillings than he had thought it to earn pounds, and so his early enthusiasm very speedily evaporates. But does he therefore renounce all effort? Not if he have in him any of the makings of a man. The youthful eagerness and hopefulness are gone; but throughout life, amidst all its trials and vicissitudes, he carries along with him the same

earnest, fixed resolution, by slow steps, if not by swift ones, to amass a fortune for himself.

The problems which in the present day present themselves to the thinker are indeed, in a very literal sense, problems of life and death. When one hears that a friend is dangerously ill, hovering between life and death, one's mind is naturally at once assailed by a restless and feverish anxiety. Now, although the excitement of the anxiety naturally subsides if the illness proves more tedious than was anticipated, crisis succeeding crisis without any material change, surely the utmost solicitude for the fate of the sufferer continues up to the very last. In like manner it is natural enough that the intense, eager excitement which the first suggestion of the great problem of speculative thought is calculated to awaken should subside as the years roll on, and we find ourselves as far from a solution as ever; but surely this does not excuse the loss of all interest in those great problems, all caring as to what the results may be. What excuse can remain for sleepy indifference on the part of men who have even once been awakened to the fact that the world is asking, "What is man? Whence came he? What his bourn?"

Now the objection may here arise, that all this may be very true, but that these remarks might be directed with equal justice against all educated men,—that I am not redeeming my promise of distinguishing the case of lawyer from that of the members of other professions. But, in truth, the position of the lawyer is in these matters peculiar, and is readily distinguishable, at all events, from that of the members of the two other learned professions, the Church and medicine. There is no danger of ministers of religion, if they be worthy of the name, losing sight altogether of the great problems which perplex the thinkers of our day. It is part of their lives' work to make themselves familiar with the thought of the times, and to strive to minister comfort, counsel, and direction to those of their flock whom that thought has troubled or perplexed. Again, the surroundings of the life of a medical man are not such as to tempt him readily to forget his latter end, or the mystery of human life, human fate, and human sorrow. The man who sees the fair child sinking in the bloom of its youth into the tomb, and the soul of the strong man full of the beauty and perfection of a ripe manhood passing out, as it were, in a moment into the night,—the man who can daily see such things and not sometimes pull himself up and ask what it all means and whither it is all tending—well, the soul of that man is an article which it is really not worth any one's while caring about. I may further point out that the connection between the science and the art, the theory and the practice of medicine, is a most intimate one, and consequently it is impossible for any medical practitioner who keeps abreast with his times to lose interest in or cease altogether to study the progress of those wide branches of inquiry which group themselves together under

the head of physical science. There are some branches of medical science, too,—insanity, the physiology of the brain, etc.,—which touch very nearly upon the higher regions of speculative inquiry. The danger for the medical man, in short, is not so much that he will lose all interest in the progress of speculation, but that the peculiar nature of his calling will prejudice him in favour of materialistic conceptions.

But the case of the lawyer greatly differs from that of the two professions to which I have referred. In the first place, an acquaintance with the science of law is not necessary to its successful practice. I recollect once at a book sale buying a copy of a well-known and original treatise upon the philosophy of law, presented with the author's compliments to one of the most successful and most conscientious practitioners of the day, one so thoroughly versed in the literature of practice that he could lay his finger in a moment upon the authority for any legal proposition. I opened the book, and found that though it must have been in his library for years, it was uncut as it left the binders. That every one should endeavour to make himself familiar with the theoretical principles of that science whose practical teaching he is called upon to carry out, and that the prevailing ignorance of the science of law is discreditable to the profession, I frankly admit. But I am now dealing with what is, not with what ought to be, and the fact is so, that lawyers are not compelled by any of the exigencies of practice to keep themselves familiar with the progress of thought even within the higher domains of their own profession. Nor is there much in the actual practice of the law to quicken a waning interest in speculative thought. The lawyer has not, like the members of other professions to which I have referred, any charge over either the souls or the bodies of men; his only interest, his only title to the support and esteem of his fellows, is his diligent care of the supplies. In the whole course of the practice of the profession, indeed the only incidents in which one can trace any suspicion of the "demonic," are the making and the reading of a testament, and the surroundings of both these episodes are generally too sordid to suggest any association with the infinite.

But whilst I am careful to distinguish the case of the lawyer, I am by no means desirous of pushing this distinction too far. Much of what I have already said, and much of what is to follow, is no doubt more or less applicable to educated men of all classes: all I insist upon is, that it is all, and all peculiarly, applicable to the case of the lawyer.

"Work, don't think," was the advice given to the modern world by one of the greatest thinkers of our day; and the world seems to be following this advice far more faithfully than did its author. Most professional men, and others who receive a liberal education, experience in the course of their university studies at

least a transient interest in the great problems of speculative philosophy; but in some professions, and certainly in the legal profession, in four cases out of five such interest is dead, or all but dead, at twenty-five, in nineteen cases out of twenty no trace of it remains at thirty. Men pass out into the profession and other pursuits. The eminently practical character of professional work, the tangible nature of its pecuniary results, especially when these results fit in with the prospect of marriage, or later, with the exigencies of an increasing family, and the high esteem in which the successful man of business is held by the world,—all these possess a singular charm for the man who has been troubled with a certain uneasy conviction that he has been dreaming long enough, and that though he has been busied for several years with the problems of philosophy, has mastered Locke, dipped in Spinoza, and even nibbled at Hegel, he is yet no nearer the truth than when, a student in the junior logic class, he first opened Jevons. There is perhaps a good deal to be said for the man who, endowed with only commonplace abilities, and consequently as incapable of appreciating the real bearings of the great intellectual problems of the day as is the ordinary Glasgow ruffian of following a discussion upon the relevancy of an indictment, is content on grounds like these to renounce altogether the higher problems of philosophy, and, busied with professional pursuits, to sink down into a respectable go-to-church-once-a-Sunday orthodoxy. For commonplace mortals that may do very well, but I must confess that to me it is matter of daily wonder to see men adopt the like course who were undoubtedly made for higher things. There are men who have obtained eminence, or are even now first making their mark in the different professions, who are undoubtedly qualified to take a prominent part in the discussion of the current problems of philosophy, and it is indeed difficult to understand how such men can entirely renounce not only all participation, but apparently also all interest in the deeper thought of our time. They know, for in their young days at the University they must have heard them discussed, what the issues are; and, having once heard these issues raised, how can they, without falling into complete scepticism, renounce all further endeavour towards their answer? The reply which such men would probably give to this criticism may be summed up in the words: "*We haven't time.*" They will tell you that once certainly these questions had for them an interest, even a fascination, but now that they have got engrossed with the world's work, they find it quite as much as their shoulders can bear. Their youthful enthusiasm has died away; "all they were is overworn." Now there can be no doubt that the world's work is sore upon many in our day, that man's time is short and sadly occupied; but still this explanation, or apology, if I may so call it, is not, after all, wholly satisfactory. Most men, no matter how busy they may be, can find time for

politics, and if for politics, why not for thought? The want of time too, whilst it may account for failure to participate in speculative inquiry, affords no excuse for the prevailing lack of interest in the progress of such research. The fisherman's wife goes about her usual work during the raging of the storm, and if you ask her how she can bear to do so when she well knows that at any moment her husband's life may be in imminent jeopardy, she will tell you that—

"There's little to earn and many to keep,
Though the harbour bar be moaning."

Yes, but though the fisherman's wife has no time for fearful bewailings or anxious watching, she is not one whit the less really anxious for her husband's safety, her thoughts are often on the deep, she shudders at each louder gust, and looks eagerly for the morning light. She cannot control the storm, she has "no time" even to go to the beach to watch the course of the blast, but she is nevertheless intensely interested in its progress and result. Now, how comes it that it is otherwise in regard to the relations even of intelligent men of business to the progress of speculative thought? Why is it that so few take any interest in the fate of that barque which has gone forth on a mission more momentous far than ever filled the sail of fisherman—

"To seek
If any golden harbour be for men
In seas of death and sunless gulfs of doubt."

The man of business may be unable himself to participate in the work of speculation, but surely that fact affords no explanation of his lack of interest in its progress and results. We are not all soldiers, but what heart amongst us does not march with our armies to the field? A man, even of the highest mental endowments, may be quite unfit, from want of professional training, to plead his own cause; but surely this does not prevent him watching with the keenest interest the progress of the case. Now, if this be so in trials in which the highest possible stake is a mortal life, how shall we find an explanation of the apathy of men to the result of that trial in which the all too clearly drawn issue is eternal life or eternal death for the race of man? I cannot profess to offer any satisfactory solution of this problem, but nevertheless I believe that the position taken up by those who renounce philosophical speculation, as incompatible with professional success, is a most unfortunate and disastrous one. We lose the best men. The men who make their mark in the business world are generally men of sound common sense and wide sympathies with their fellows. Such men are lost to philosophy. If the influences of faith reign in their hearts, they sink into a respectable orthodoxy; but if, on the other hand, they are devoid of any such controlling and directing power, aware of the great questions which the world is asking, and unable or unwilling to

attempt their solution, whilst generally conforming to the decencies of church-going respectability, they become and pass through life truly sceptics, or, as we now call them, agnostics at heart.

Such men being lost, there are left to philosophy, on the one hand, extravagant and unpractical enthusiasts; and, on the other, cold, unspiritual, unsympathetic realists. The results are manifest in our day. On the one hand, we have æstheticism, neo-paganism, socialism, and all manner of extravagance; on the other, a cold dogmatic materialism. Now, as one to whom, as in the main a follower of Kant, both extremes are equally repugnant, I cannot but deplore the dearth of all rational idealism in our day, and I believe one of the chief causes of this want to be the dearth of all philosophical enthusiasm amongst those to whom we naturally look as the champions of an ideal philosophy. I repudiate, and repudiate with emphasis, the suggestion that there is any incompatibility between speculative and practical ability, between enthusiasm and common sense. A thorough and accurate acquaintance with Bell's *Principles* is not incompatible with a familiar knowledge of Kant's *Kritique*; and there is no reason why a man's ability to deduce a title to heritable property through a long progress should suffer from an acquaintance with the *Deduction of the Categories*.

Whoso renounces all speculative enthusiasm, all higher thought, all wonder, deliberately sacrifices all that is best, all that is highest and most godlike in his nature. He may indeed do good work in the world; he may be an honoured and useful member of society. So was Martha, but none the less had Mary chosen the better part. The prize in the battle of life is to the victor—

“ Τῇ νικῶντι δώσω αὐτῇ φανερῶν ἐκ τοῦ ξύλου τῆς ζωῆς.”

But the victor is not he to whom the world awards the prize. Else were the result anomalous, else were the judge suspect. The world is, in fact, the worst possible judge in this contest, for he truly is the victor, not to whom there is victory *in* the world, but whose victory is *over* the world. The former may attain high professional eminence, amass great wealth, and bequeath a glorious name to posterity; but he truly is the conqueror, his the victor's palm, his the Morning Star—

“ Who has striven
Achieving calm, to whom was given
That joy that mingles earth with heaven.

“ Who rowing hard against the stream,
Saw distant gates of Eden gleam,
And did not dream it was a dream.”

SIR ARCHIBALD ALISON.¹

SIR ARCHIBALD ALISON, historian of Europe and sheriff of Lanarkshire, thought fit to write and leave behind him for publication an autobiography, being of the opinion that "an author who has met with any degree of success owes a brief account of his life and writings to both his family and his country." The recent appearance of this work has revived an interest in one whose works are widely known, if not widely read—in one who certainly deserves all praise for the industry with which he made use of such talents as were committed to him. Many men who enjoy leisure may well feel ashamed when they read of the way in which Sir Archibald, in the midst of much business, occupied the limited time at his disposal.

He wrote upon law, history, and politics: his History, even in an abridged form, is a work of very considerable size; and he contributed largely to periodical literature, having occupied apparently for some years the important post of "prophet of evil" in *Blackwood's Magazine*. With his politics or his views upon political economy we have fortunately nothing to do. Every one will give him credit for the honest and manly expression of these views, which was quite regardless of mere party considerations. As a legal writer, he has not obtained the first rank. Hume will probably always remain *the* authority upon Scottish criminal law, while Mr. Macdonald's handbook has brought down the subject to a modern date.

But in these two volumes which contain the account of his life and writings, there are to be found the record of a number of incidents, accompanied by observations of the author, which cannot fail to interest the legal reader, and are deserving of a notice in our pages.

Sir Archibald Alison was born at Kenley, in Shropshire, of which parish his father was incumbent, in 1792. In those easy-going days, it was competent for a man to draw the revenue without doing the work of an English living. Accordingly, while still retaining his English preferment, Mr. Alison became in 1800 incumbent of an Episcopal chapel in Edinburgh—an arrangement which was very convenient for him and his family, if not for his parishioners. Young Alison was sent to the High School and afterwards to the University. Towards the bar as a profession, he seems to have been guided by the wishes of his father. When a mere lad, he had written what was intended to be a refutation of the much abused and misunderstood Malthus. He showed this essay to his father, who seems to have been much impressed with the talent which it exhibited. "Archy," he said, "I won't allow

¹ *Some Account of my Life and Writings; an Autobiography by the late Sir Archibald Alison, Bart., D.C.L.* Blackwood & Sons, 1883.

you to become a banker: you were made for something very different from that; what would you say to the bar?" Young Alison adopted the paternal suggestion, having, as he tells us, "no particular predilection for that more than for any other profession; but I readily embraced his views, which had often before occurred to myself, and had only been checked by a dread of the slow progress usually made in that line."

If he has not exaggerated the position to which he speedily attained at the bar, and the promotion which was within his reach, his subsequent career sufficiently proves that he had no great professional ambition. That a young man in good practice, of excellent constitution, and with a perfect confidence in his own abilities, should, notwithstanding the prospect of the Solicitor-Generalship before him, seek for the hard-worked and indifferently paid post of Sheriff of Lanark—a post almost certain to prevent further preferment—is certainly rather surprising. Men, we know, are apt, after accepting such posts, to overrate what they have left behind them in doing so, and pour into the ears of their friends, or set before the eyes of their readers, a glowing account of what might have been. But Sir Archibald's conduct is, we think, sufficiently explained by the fact that his ambition seems all along to have never been of a legal character. This is shown even in his early years at the bar, when his long vacations were spent not in hovering about Edinburgh in the hopes of a stray guinea—as your rising young man usually spends them—but in expensive tours over the Continent, storing his memory with scenes to be afterwards produced in his *History of Europe*. The fear lest his agent friends might desert him, as a rolling stone which could gather no moss, never seems to have crossed his mind. He did what, as regards their profession, ruined Scott, Gibson Lockhart, John Wilson, and many others, while, notwithstanding it all, he reaped greater professional rewards than fell to any of them.

He was called to the bar in 1814, and "from the first," he tells us, "obtained a respectable, and ere long a considerable share of business." And yet it was not a time favourable for juniors. Those were the days of written pleadings, "when for two or three guineas a young man wrote as much as would make fifty or sixty octavo pages of print." But this system had one advantage, it enabled a senior to take a junior by the hand, in a manner which somewhat resembled that now practised in chambers at the English bar. Thus Alison benefited by the overflow of Mr. J. H. Mackenzie's practice. "He sent me," we are told, "the process, as was not uncommon with counsel at that period in high practice, and I returned it in a few days with a draft of the paper which appeared with his name. A great number of the papers bearing his signature from 1815 till he was put on the bench in 1820 were written by me." The labour was, however, very great. "I wrote all my papers

with my own hand, leaving it to my clerk to copy them out in a clean manuscript for the agents, and to take in such extracts as I marked for insertion. I have frequently sent to the agents and to Mr. Mackenzie a thousand or twelve hundred pages of my clerk's writing in a week, which would make a large octavo volume; and on more than one occasion I have written with my own hand a paper of thirty pages of Session print, or at least seventy of common octavo, in a day."

But his industry was rewarded. In less than three years he was in advance of most of his contemporaries, and earning from five to six hundred a year. Looking to the nature of his fees, and to the fact that he was neither the son nor the son-in-law of an agent, such success excites our wonder.

Sir Archibald has given an interesting notice of the legal circles which existed while he was at the bar. During the early period of the century, promotion had been in the hands of the same political party, and their patronage had been too exclusively used. "Their object was in general to select not the ablest, but the most accommodating men; not those of original thought, but those of marketable abilities." Hence, according to our author, "men of independent character" had, for the most part, joined the opposition, and those possessed of the business. The bench was Tory, and the bar, or at least the practising bar, was Whig. At last Government was reduced, out of sheer necessity, to overlook a man's politics, and appoint to judicial office their political opponents. The following eminent Whig lawyers were all raised to the bench by a Tory Ministry, viz., Cranstoun, Gillies, Moncreiff, Cathcart, Fullerton, and Clerk.

According to Alison, there was "a dearth of talent, learning, and information outside the range of their profession" upon the ministerial side of the Parliament House. The Whig coterie, on the other hand, exhibited "more talent, knowledge, and discursive conversation." But if the Tories were dull, and their dinners monotonous, the Whigs were conceited and exclusive. They were cold towards Scott, looked upon Wilson as crazy, ignored Lockhart, and exhibited their spite by preventing for long the binding of *Blackwood's Magazine* in the Advocates' Library. The defects of both parties led to the development of a third whose members, "though strongly attached to Conservative principles, associated little with either of those circles, but formed a society of their own, characterized by the usual waives of such legal associations. It was exceedingly joyous, clever, and animated. It abounded in those anecdotes of the judges by which young lawyers generally revenge the tyranny of the bench; and it might easily have been foreseen that its members would, ere long, take a prominent part in public affairs." To this party belonged John Hope, Duncan M'Neill, Patrick Robertson, and Lockhart. But even with its members Alison does not seem to have been entirely at one. They

were too professional, their talent was of a professional kind, and their conversation and anecdotes savoured too much of the confined atmosphere of the Parliament House. Of Hope he has given us a sketch, which, perhaps, may be hardly impartial, as it afterwards appears that its subject manifested some ill-temper towards Alison and the Lanarkshire Sheriff Court. This is what he says concerning him:—

“He had considerable reasoning powers, a retentive memory, and vast application—the qualities of most value in forensic contest. To these were joined an ardent ambition, a steady volition, unbounded industry, and a great degree of self-confidence,—a quality which, when at all justified by others more substantial, will probably be found not the least important element in professional success. His heart was often generous, but his desires occasionally were rather selfish; his manner, though sometimes haughty, was always dignified; his temper became arrogant as he advanced in station and influence; his self-confidence, always great, at length degenerated into rashness; his industry never forsook him, but it was exerted rather to prop up prepossessions hastily formed, than to collect the materials for deliberate judgment. Hence his reputation was much greater as a pleader than a counsellor—at the bar than on the bench. He was a man of talent, but not genius; he never struck out a new idea, but was capable of great efforts in elaborating those of others.”

Of Lockhart he says: “He had not the business talents of Hope; and having neither the power of public speaking nor any turn for legal disquisition, he made no figure at the bar, and, indeed, scarcely ever had a case.” The mention of Lord Chief Baron Shepherd reminds us of an age of sinecures for ever passed away. What could the Court of Exchequer have found to do in such a country as Scotland, and how did the Chief Baron spend his time? Shepherd had been Attorney-General for England, and according to Alison, accepted this subordinate post in Scotland on account of his deafness. “The Chief Baron,” he says, “was the most favourable specimen of that singular, and perhaps unique, race of men, the English serjeants-at-law.” His opinion of William Clerk, brother of Lord Eldin, and an official of the Jury Court, but a man now almost forgotten, is certainly high. “In force of expression and caustic severity of remark, William Clerk was superior to either Scott or Jeffrey, and they readily yielded to him on questions of antiquarian lore.”

After some years in the Parliament House, Alison could write in these terms: “I had enjoyed a remarkable career of professional success. During eight years I had been at the bar, I had not only paid all my own expenses, and accumulated a considerable library and a very fine collection of prints, but had defrayed the charges of four long, and from the rapidity with which great tracts of ground were gone over, costly journeys on the Continent. These

repeated and dangerous diversions from the beaten career of professional duty had, by good fortune, not been attended with injurious consequences to my professional prospects, and in the year 1822 I found myself in more extensive practice than any of my contemporaries except Hope, who had never quitted home, and who enjoyed peculiar advantages from his father being at the head of the Courts." This position in the profession, combined with his sound Tory politics, led to his appointment as one of the advocate-deputes—a post which he had dreaded lest it should interfere with his pleasant vacation rambles. . It was while occupying this post, and at the instigation of Hope, who had become Solicitor-General, that in 1824 he published an essay on the administration of criminal law in Scotland. In this publication he sought to demonstrate "that criminal justice was better administered by the official functionaries in Scotland, who are intrusted with its discharge, than by the unpaid magistracy of England; that the substitution of professional men as public prosecutors for the injured parties, is more likely to lead to discrimination and efficiency, than intrusting the issues to the passions or interests of private individuals; and that the Act of 1701 (the Habeas Corpus Act of Scotland) provided a more effectual remedy against arbitrary and prolonged imprisonment than the celebrated Act of that name in England." With these views most of our readers will now concur; and yet, looking to the arbitrary character of the men who had but lately held the management of these prosecutions in their own hands, and keeping in mind such trials as that of Muir, one cannot be surprised that early in this century the superiority of our Scottish system had been called in question by wise and enlightened writers in the *Edinburgh Review* and elsewhere.

To return to Alison's sketches of men of his time. Of John Clerk he says: "He was not an eloquent man, had little general reading, and was utterly careless of the graces of composition or the flower of rhetoric. Strong argument, caustic expression, and occasional happy antithesis constituted his favourite weapons, and no one ever wielded them with more powerful effect—no one but his redoubted antagonist, Adam Gillies, could withstand the force of his blows in legal argument. He was very lame, one leg being six inches shorter than the other, but the remaining limbs were singularly strong and robust. Nothing could daunt him, and few ever found him without a retort. On one occasion, when pleading before Lord Chancellor Eldon, he said, 'In plain English, my lord'—'In plain Scotch, you mean, Mr. Clerk,' replied his lordship. 'In plain *common sense*, my lord, if you understand that,' rejoined Clerk, descending, as he was wont, with his body on his short leg."

Cockburn, we are told, had not the intellectual power of Clerk, nor the intensity of expression, but greatly excelled him in oratory. "He had the soul of genius in his composition. No one was so capable, in Scotland at least, of guessing the feelings of his

auditors, or by a happily-timed expression or epithet, of thrilling the heart."

Andrew Rutherford was, according to Alison, superior in legal acuteness and argument to both Cockburn and Jeffrey—an accomplished scholar; superior in Italian to any local teacher of that language; a bibliomaniac, whose taste was, however, "for fine editions and costly works rather than readable books."

A visit to the House of Lords in an appeal case gave Alison an opportunity of observing the professional abilities of Lushington and Brougham. "In sarcastic power the latter was unrivalled; but though extremely forcible in expression, Mr. Brougham did not convey to my mind the impression of a great lawyer, not so much as John Clerk and George Cranstoun had done at Edinburgh on various occasions before." The clearness of Lushington's pleading struck him more than did that of his rival.

Alison continued to act as Advocate-Depute until 1830, when the Tories went out of office. In his own opinion, he ought by that time to have been either Lord Advocate or upon the bench. Considering that by 1830 he had only been sixteen years at the bar, it is impossible to feel much sympathy with him in his disappointment. The leisure which being upon the opposition side of the Parliament House now afforded him, was occupied with literary work, and in a short time he produced his treatise upon criminal law, the second volume of which was finished in 1832. To some it seems to have given offence, as his attempt to evolve principles out of many judgments necessarily implied a dealing with several decisions in a way sometimes not altogether pleasing to the bench by whom they had been pronounced, and which necessarily at the time produced some feelings of irritation.

His loss of office seems to have disgusted him with appointments which were necessarily not of a permanent nature. Accordingly, when a vacancy occurred in 1834, by the death of Mr. Rose Robinson, his friends being again in power, Alison sought and obtained the Sherifffdom of Lanarkshire. "New and higher objects of ambition had opened to my mind," he tells us. "Literary had come to supersede legal ambition. I no longer desired to be Lord Advocate. I felt that such an appointment would prove fatal to my independence, and crush any original thought that might be evolving in my mind." The Lord Advocate, Sir William Rae, expressed the opinion that he was a fool. "What," said he, "give up your prospects here! You are perhaps not aware that I am going to recommend you to be Solicitor-General. My great object is to put you on the bench." The bench would certainly have afforded not only higher remuneration, but much greater leisure for the prosecution of literary studies. But the sheriffship was in his grasp—the bench merely a possibility depending upon the stability of an administration in which Alison had no faith. Accordingly he packed up his household gods and went off to

Possil House, near Glasgow, where he spent the rest of his long and happy life, his time pretty fully occupied between administering justice and writing history.

The present volumes contain much that is interesting and instructive relating to the condition of Glasgow and the county of Lanark some forty years ago. The office which he had obtained certainly called for an active man. The amount of judicial business was great, and he started with an arrear of above one hundred cases. In addition to this, there was much to attend to connected with his administrative duties, extending over a large mining county liable to strikes and other trade disturbances, and possessing (except in Glasgow itself) at that time no regular police. There were only two sheriff-substitutes in the city, one advanced in years and the other in feeble health. "The first thing I heard," he says, "when I arrived in Glasgow, was, that the elder substitute was three hundred cases in arrear, and that many of them had been twelve, some eighteen months before him." Alison took up two hundred of these cases himself, and got through them in three months, in spite of his own regular work. At first he had to undertake all the Small Debt and Criminal jury cases; but the duties to which he specially refers are those which fell to be performed in preserving peace and suppressing sedition. We fancy he enjoyed more riding at the head of dragoons, or making a raid upon secret conspirators, than listening to legal arguments and solving knotty points of law. In 1835 he had the satisfaction of returning to Glasgow with eight-and-twenty prisoners surrounded by a troop of horse. These were Roman Catholics from Airdrie, who had planned an assault upon the Orangemen of the district. But his next blow was directed against Protestants, who had sacked and burned a Romish chapel. A commercial crisis in 1837 led to great strikes. The cotton-spinners set an example which was followed by the whole colliers and iron-miners in the county. Over forty thousand persons were engaged in these combinations, while 280 men represented the entire strength of the police. This was an emergency in which the Sheriff exhibited great spirit. He discovered, or believed that he had discovered, the existence of a secret committee pledged to the carrying out of all manner of crimes. Their headquarters at the Black Boy Tavern in the Gallowgate, and day and hour of meeting, having been revealed to him by an informer, he arranged to go and make the arrest himself. Armed with a big stick, and accompanied by some officials and police, he visited this place at night, and having surrounded the building with constables, he himself ascended a trap stair and found the conspirators all assembled. They seem to have submitted quietly, and were speedily committed for trial. The subsequent proceedings do not seem to have exactly met with his approval. He exhibits, in fact, that jealousy with which a Sheriff is apt to view the conduct of cases concerning which he himself had formed

a strong opinion, when they fall into the hands of the Crown authorities. The public, however, are not likely to sympathize with his feelings. His proceedings had rendered Crown counsel uneasy. "Left thus," he says, "charged with the entire responsibility of the step, I was indefatigable in my efforts to collect additional evidence, so as to make out a case for prosecution; and ere long, so much was accumulated that it became impossible for any Government, how reluctant soever, to decline engaging in it." He was only given four hours' time in which to revise the indictment; in which time, however, he "discovered and corrected several fatal errors." By his zeal he rendered himself very unpopular with the trades-unionists, who sent him threatening letters, and denounced him over Glasgow by means of placards. The trial took place in Edinburgh in January 1838, and mainly, as he attributes, to the feeble action of the prosecutors, resulted only in a sentence of transportation. He received consolation in a letter from his friend, the ex-Lord Advocate, who wrote, "If we could only get these knaves of ministers out, I don't think a fortnight would elapse before I should see you on that higher bench which I have always thought you so qualified to adorn." So extreme were his own political prejudices, that he had doubted whether the Whig Government would sanction coercive measures towards persons implicated in proceedings similar to those to which their own elevation had been owing.

Upon another occasion, however, he had the melancholy satisfaction of seeing his local gallows put to some use. An overseer upon the Edinburgh and Glasgow Railway had been murdered for an offence against trades-union principles. For this murder two Irishmen were sentenced to be hung at the scene of the crime. The active Sheriff assembled 1800 soldiers, including 600 cavalry, to assist him in carrying out the law, as there were in the neighbourhood 60,000 Irish who strongly sympathized with the prisoners. He has given us a graphic account of this execution, of the prison surrounded with troops, of the melancholy procession through the streets thronged with some 200,000 silent and awe-struck spectators, away out into the lonely country, of the return with "the dead bodies in the same imposing order in which we had gone out, and amidst the same prodigious concourse of people," who were now, however, making a "din as loud as the silence had before been awful." He condemns on this occasion the cowardice of the Glasgow magistrates, who, upon the rumour of a riot, "began on various pretences to excuse themselves from attending," and who pleaded that it was their duty to remain in the court-yard of the jail while the execution was going forward.

Alison's opinions upon the subject of execution are quite in keeping with the intensely conservative constitution of his mind. According to him, when a capital sentence is carried out, it should be not only with the utmost solemnity, "but in the most public

manner. Private execution in prison is pure judicial murder, for it is unattended with the only circumstance which can justify the taking away of life—the exhibition of an example which may deter others.” Upon this subject, as upon many others, the progress of civilisation has led the public mind to form an opinion entirely opposed to that of the late Sheriff of Lanarkshire. The fact that an execution has taken place ought to have full publicity given to it; but over the wretched details let as thick a veil as possible be drawn.

But the mind of Alison was quite alive to reforms of another kind. In his struggle for increased court accommodation all will sympathize with him. “When,” he says, “I came to Glasgow in January 1835, I found the Court-house and Public Office in which the public and Sheriff Court business was carried on in the most miserable condition. The former, though erected in the year 1810, had already, from the vast increase of population and crime, become altogether disproportionate to the necessities of the district. It had no jury rooms, and the accommodation for witnesses was so wretched that eight hundred or a thousand persons compelled to attend the Court to give evidence were often shut up during the day for a week together in a couple of rooms more resembling the Black Hole of Calcutta than anything known in civilised society.” For these evils he set about with energy to find a remedy. In this matter he was at first opposed by his own friends. The Conservatives of Lanarkshire raised the cry of assessment, “so easy to awaken, so difficult to allay.” Then, after an Act had been obtained, the city refused to elect commissioners under it, and the Glasgow Town Council actually intimated that they expected the Sheriff to pay the Parliamentary expenses. It was long before he had the satisfaction of seeing his project for the public good carried into effect.

Alison had a justifiable pride in the Court over which he presided, in their amount of business, and the speed with which it was transacted; and as the Parliament House faded from his memory, there arose in his mind that spirit of rivalry which induces Glasgow officials to draw up statistics and speak in rather contemptuous terms of the supreme tribunal. “One effect,” he says, “resulted from the popularity of the Sheriff Court of Lanarkshire, and the immense extent as well as rapid extension of its business, which, though felt at first as rather annoying by myself and my substitutes, in the end was attended by beneficent effects. Some jealousy of the popularity of the Sheriff Court of Lanarkshire was excited, both in the bar and on the bench of the Supreme Court at Edinburgh, by the mortification the latter experienced at seeing their own business declining, while that of a local and inferior Court was rapidly increasing, and carrying off nearly all the mercantile business of the great commercial city of Glasgow.” His old friend, Lord Justice-Clerk Hope, gave expression to this feeling

"on every possible occasion with much acrimony." A return to the House of Commons proved that while in Hope's division there were decided yearly some eighty or ninety cases, and even in M'Neill's these only averaged two hundred, Alison was overtaking from a thousand to twelve hundred.

Upon this subject statistics are peculiarly misleading. If the importance of a Court is to be estimated by the mere number of cases, then the Court of a Glasgow Stipendiary Magistrate must rank higher than that which is held in the House of Lords. A mere glance at the reports is sufficient to satisfy any Sheriff Court practitioner of the fact that there are single cases in the Court of Session calling for a greater knowledge of law, and greater research upon the part of the judge, than would be necessary in the consideration of fifty ordinary processes before the Sheriff.

While Alison began to think less of the Court of Session, his opinion of its judges was also modified. They were no longer the giants he had known in his younger days. In 1854 he met, at the house of a well-known Perthshire laird, the late Lord Ardmillan, "a perfect gentleman," he says, "in his manners, possessed of considerable oratorical powers and a great and easy flow of conversation, a popular judge, and an estimable private man. But his presence scarcely made itself felt" (amidst the company at their house), "and this was entirely the result of a feeling against his professional position, as no one could be more pleasing than he was personally." This is really too absurd. If he had said that Lord Ardmillan's position did not exalt him in the eyes of the other guests, it would have been doubtless true enough. But that the fact of his being a Lord of Session lowered him in the estimation of such men as the Duke of Hamilton, Brewster, Murchison, Rawlinson, and Whewell, is utterly ridiculous. They met him as a private gentleman, and no doubt estimated him at his true worth. But he was not to them a magnate as Boyle and Hope had been to the youthful Alison. If from a social point of view our judges have deteriorated, this has arisen from the desire of modern administrations, whether Whig or Tory, to appoint men, not as formerly, because they were scions of the house of Dundas or Hopetoun, but out of a simple regard to their legal qualifications. According to the late Sheriff of Lanarkshire, however, the cause of deterioration was something very different, and "bespoke the growing ascendancy of an inferior class in society in political influence, and was the herald of those times when, from the general Americanizing of our institutions, patriotic worth, independent talent, and polished manners were to be hustled out of the race, and public appointments were to be sought after by and only bestowed on needy mediocrity-democratic blustering and time-serving ability." All this trash follows upon such a text as Lord Ardmillan! Alison often wrote foolishly, but surely never did he pen anything more foolish than the above extract.

The reader of these volumes will doubtless close them with the impression that their author was a very egotistical man, with no small amount of self-conceit, and hampered with prejudices which seriously affected his opinions upon many subjects. But at the same time there is much to admire in Sir Archibald Alison. In some respects he was liberal; he writes generously of others, and his dislike to a man's views did not necessarily extend to the man himself. The sketches which he gives of Mr. Gladstone and of Lord Moncreiff are highly creditable to him. He was entirely free from the narrowness of a mere Scottish lawyer. He was a keen politician, but no partisan. Blackwood rejected his articles, and Peel sneered at his pamphlets, but this made no difference to him. He spoke and wrote what he believed to be the truth, regardless at once of his own interests or the exigencies of the political situation. As Sheriff of Lanark, he had done not a few things to render him unpopular; but Lanarkshire was proud of the brave old historian, and many thousands of its inhabitants manifested their respect when his remains were being carried to their last resting-place.

Reviews.

The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities. By JAMES LORIMER, LL.D., Advocate, Regius Professor of Public Law in the University of Edinburgh, etc. Vol. I. London and Edinburgh: Wm. Blackwood & Sons. 1883.

IN coming before the world with this work, Professor Lorimer brings with him—to the wider public, beyond the narrower one of those to whom was previously given, for the brief period of a session, the good fortune of going through the eminently intellectual discipline of his course of lectures—a reputation as a speculative jurist already made in two continents by his *Institutes of Law*. The present work follows pretty close on the second edition of that one, which is now three years old. In his former work he laboured with conspicuous success to show that jurisprudence was a science having its base on first principles in the nature of things as firmly as any other science mental or physical, and struck the keynote of his theory in the prefixed quotation from Burke, “All human laws are, properly speaking, only declaratory.” Following as it does on an exhaustive encyclopædic treatment of the scientific bases of its subject, the present work (of which we have yet only the first volume) differs from nearly all—we may say all—others in the same province out of Germany, where we must go for a parallel treatment of the subject. If, from its method, less practical—in the narrower sense—than its compeers, it is more scientific and philosophical: if it deals less with instances, it discourses more of

principles. The author's position in this respect is acknowledged and vindicated in his preface, where he says, "My anxiety to place International Law on deeper and more stable foundations than comity or convention, and to vindicate for international jurisprudence the character of a science of nature which I have elsewhere claimed for jurisprudence as a whole, has led me to depart to a considerable extent from the lines which are followed in ordinary text-books. More prominence has been given to the ethical element, and the conception of the interdependence of States has been substituted for that of their independence." For to him jurisprudence is related to ethics as species to genus. From this point of view he sets out with the definition of his subject as "the law of nature realized in the relations of separate nations," and its object as "the realization of the freedom of separate nations." The rules of every species of positive law, of which Public International Law—or, as Professor Lorimer prefers to call it, the Law of Nations—that is, the *jus inter gentes*, as distinguished from the *jus gentium*—are evolved from the principles of the Law of Nature, which contains, *in gremio*, the regulation of every possibly occurrent jural relation, awaiting only the emergence of the particular circumstance of each to call for its *declaratory* enunciation by the legislator or the judge. Of the kinds of positive law, the *jus inter gentes* has been the latest to emerge from the bosom of natural law, and its evolution is still only inchoate. This is owing to the complex nature and undefined condition of the *personæ*,—States and nations,—and of the jural relations of these with each other, with which it deals; to the want of "a definite and proximate terminus *ad quem* to its progress;" and of any international judicature and executive to apply and enforce its provisions. Municipal law in some form, more or less rudimentary, existed centuries before International Law—and even before history—came into being, by the formation of separate political communities having permanent relations with each other. But the law of nations is comparatively the product only of yesterday, and barely existed in the ancient world. It is this condition of things which drives the international jurist back on theory for a system, and it is with the search for some basis in first principles for that branch of positive law which is his subject, that a large portion of the author's present volume is occupied.

After the great primary one of natural law, the sources of the law of nations are custom, treaties, precedents, scientific interpretation, to be found in the acts of legislatures and in the writings of jurists, whether acting in conjunction, as in the Institute of International Law, or in isolation, as in their published expressions of individual opinion and contemporary public opinion. The chapters on treaties contains something of historical illustration; in that on scientific interpretation there is a good deal in the way of exegetical and critical review of the bibliography of the subjects.

The final division of the last source—the writings of individual jurists—has been hitherto, and will probably for an indefinite future time continue to be, the main one.

The consideration of these topics brings us to the end of the second book. The third is engaged with the doctrine of the “Recognition of State Existence.” In this part the author’s method of going back to nature for his principles appears in the consideration which he gives to ethnical as distinguished from merely political or national claims to State recognition. Panslavism and Irish desire for independence are instanced in illustration. But the race to become entitled to recognition must form a nation, for nothing but a nation can be the subject of International Law.

Having established by an elaborate consideration of the subject what are to be held as the proper *personæ* of the *Law of Nations*, the author in Book iii., which occupies the remainder of the volume, deals with the “Normal Relation of States,” that is, those relations in a condition of peace and international liberty, as distinguished from those which are actively abnormal, in a state of war, or passively so, where one nation is sullenly held under the oppression of another, as Greece formerly by Turkey. The second volume is thus left, we presume, to deal with the laws of war, neutrality, and intervention. We have endeavoured to indicate the outlines of this work. In the way of detailed comment or criticism of its contents space at present forbids us to do aught that would render justice to the importance and value of its contents; but leaving it, as we do with reluctance in the meanwhile, we hope to make some attempt in this direction on a future occasion.

The Institutes of Gaius and Justinian, The Twelve Tables, and The 118th and 127th Novels, with Introduction and Translation. By T. LAMBERT MEARS, M.A., LL.D. Lond., of the Inner Temple, Barrister-at-Law, Author of “Analysis of Ortolan’s Roman Law.” London: Stevens & Norton. 1882.

THE author states in his preface that his present volume “is designed to supplement his Analysis, or rather Digest, of M. Ortolan’s *Roman Law*, by placing before the student the text and translation of the *Institutes of Gaius* (not given by M. Ortolan), the text and translation of the *Institutes of Justinian*, the fragments of the text and translation of the *Twelve Tables*, and the Greek text, Latin version, and translation of the 118th and part of the 127th Novels.” Those who prefer Mr. Mears’ “Analysis of Ortolan” to the original, will doubtless be pleased to have this supplement; for it really furnishes them in another form with much of the contents of Ortolan’s treatise that is excluded from abridgment. Even to others it may be useful, as presenting

the texts of Gaius and Justinian in parallel columns, after the manner of Gneist's *Syntagma* and Cumin's *Manual*.

The book opens with an introduction of sixty pages, containing a good deal of interesting and useful matter. First there is an account of the discovery of the Institutes of Gaius at Verona in 1816, a description of the manuscript, and a notice of the means adopted from time to time, by chemical operations and otherwise, to obtain a full and faithful transcript of it; all stated (in text and notes) with a minuteness of detail that takes one by surprise in so elementary a treatise. A summary of the contents of the Institutes follows, and then a short account of Gaius' personal history, his place in jurisprudence, and the other monuments of his literary activity. Next comes a reference to the circumstances that induced Justinian to have the Institutes compiled that bear his name; but the author has not thought it necessary, by way of pendant to his picture of Gaius, to say almost anything about the emperor himself, or to give any account of the manuscripts or editions of his *libri Institutionum*. He has given, however, a view of the difference between the earlier and the later volumes, indicating on one side of the page the passages of Gaius that were struck out by Justinian's commissioners, and on the other side the new matter introduced by them, with references (in footnotes) to the sources of it. It is carefully and accurately done, but, as it seems to us, in part unnecessary, and in part out of place; for, as the texts of the two volumes are printed in parallel columns, the blank spaces in those columns are sufficient indications of omissions or additions, while the references to the sources of the new matter would have been much more conveniently placed in footnotes to the Justinianian text. The remainder of the introduction refers to the Twelve Tables and the Justinianian Novels amending the law of intestate succession, and contains an explanation of the author's reasons for reproducing them, and a specification of the texts to which he had given his preference.

To his choice of texts generally we think Mr. Mears might have devoted more consideration. He does not profess to give an edition of his own, either of Gaius, Justinian, or the Twelve Tables, but only to reproduce the work of others. He was bound, therefore, to make himself acquainted with the latest editions of repute, and to select for reproduction that which appeared to him to be most approved by critics of authority. He has preferred, he says, for his text of Gaius, Gneist's edition of 1858, which he has amended here and there from Polenaar's version of Studemund's *facsimile* of the Verona MS. But he ought surely to have been aware that Gneist had published a new edition in 1880, which is far in advance of his earlier one; and he ought also to have known that Polenaar's version of Studemund's *facsimile*, while not devoid here and there of happy suggestions, is yet considered by competent critics as the least

reliable of the revisions the *Apographum* has evoked. We should have thought the edition of Krüger and Studemund in 1878 would have been that of which Mr. Mears would naturally have availed himself; while he might with advantage have consulted that of the late M. Dubois in 1881, with its invaluable repository of *variantes*. For Justinian's Institutes Mr. Mears' text is "mainly that of Schrader, as used by Gneist;" again we suppose the Gneist of 1858 instead of that of 1880. Schrader's text was published fifty years ago—in 1832; it is generally regarded as superseded by that of Krüger (originally published in 1867, and revised in 1877 for his and Mommsen's edition of the *Corpus Juris*); and that of Huschke in 1868 is also far in advance of it. As for the fragments of the Twelve Tables, we are not informed what text has been employed. Mr. Mears refers, in footnotes in his introduction, to Jacques Godefroy's version of 1663, Dirksen's of 1824, and Gneist's (of 1858 ?); but he does not say which of these was before him. Possibly all of them; the result approximating more closely to the first than to either of the others, and bearing a striking resemblance to what is given in Mr. Cumin's *Manual*. But it is hardly excusable that an English editor of the Tables should be unacquainted with Mr. Wordsworth's text and commentary (in his *Fragments and Specimens of Early Latin*, Oxford 1874),—undoubtedly the most satisfactory presentation of them that has ever appeared,—and should altogether ignore Schoell's text of 1866, which has been adopted by Bruns and others in Germany as the groundwork of all the versions published there in recent years for academical purposes. Whether with those new lights to guide him Mr. Mears would have been more successful in his attempts to reproduce what Schoell calls the "relics" of the decemviral legislation, may well be doubted. He seems to lack sympathy with them—to be unable to appreciate their spirit. How tame are his renderings for such phrases as *em capito, manum endo jacito*, "let him be seized," "let him be detained by force," as if a posse of police were in attendance; instead of "seize him," "lay hands on him,"—the peremptory warrant to the complainer to take action for himself. How misleading to represent a *vindex* as nothing more important than "bail"! How innocent to set down "let him be sacrificed to the gods" as a translation of the famous penalty *sacer esto*! Many were the men on whom this sentence—"be accursed"—was pronounced, after as before the publication of the Tables, who may have had to drag through a few weary years, forsaken of gods and men, and end them with a violent death, which was unavenged, because no crime; but we do not recollect any instance in history of a man so sentenced being led to the altar and solemnly offered as a sacrifice.

Mr. Mears' text and translation of the Twelve Tables, however, are but a small part of his book; he must be judged by his treat-

ment of what forms the bulk of it—the Institutes of Gaius and Justinian. Of the texts employed by him we have already said enough. In explaining in his introduction the rules by which he had endeavoured to guide himself in their translation, he condemns the practice adopted by some previous writers of “tacking on an English termination” to technical words, so as “to give them the ring of the original,” or, where that is impossible, of retaining the Latin rather than inventing a paraphrase. We are disposed to agree with him that previous translators have sometimes gone too far in anglicizing Latin phrases. The difficulty is to decide when the original Latin word must be retained, when it can be satisfactorily anglicized, and when a paraphrase in popular language is permissible. The perusal of Mr. Mears’ book convinces us that, if anglicization be sometimes objectionable, paraphrase is positively dangerous; and that the safest course with technical words, which have no exact technical equivalent in English, is to retain the original Latin. Take a few words and phrases peculiar to the law of persons, *e.g.* *manus*, *mancipium*, *patria potestas*, *sui* and *alieni juris*, *capitis deminutio*: these are paraphrased by Mr. Mears as “marital power,” “bondage,” “paternal power,” “persons free from and subject to the power of others,” “change of legal position.” But every one of these renderings is deceptive. There was no *manus* in the Justinianian law; yet no one will pretend for a moment that a husband had no longer any powers in relation to his wife. To enumerate but a few: he could require her to reside with him (l. 30, C. ix, 9); he could get her back even from her parents improperly keeping her from him (fr. 2, D. xxxiv, 30; l. 11, C. v, 4); he was entitled under a presumed mandate to represent her in judicial proceedings (l. 21, C. ii, 13); he had an *actio injuriarum* if an insult was offered to her (S. 2, T. iv, 4); he was free from any *actio famosa* at her instance, and had in all cases the *beneficium competetentiæ*. *Mancipium*, or *causa mancipii*, in the time of Gaius, was a condition to which free persons were occasionally reduced, but which did not impair their *de jure* freedom; “bondage” is rather suggestive of slavery. The *patria potestas* was a power that could be exercised by a parent only over his unemancipated children; but a father had still many important rights in regard to those that had been emancipated, all of which would properly be included under the phrase “paternal power.” “Persons free from or subject to the power of others” is a very inadequate rendering of *sui vel alieni juris*; for a pupil was *sui*, not *alieni juris*, and yet was subject to the *potestas* of his tutor. Transition from slavery to freedom, from minority to majority, from spinsterhood to marriage, from marriage to viduity, were all “changes of legal position;” yet not one of these was *capitis deminutio*.

When we pass to other branches of the law,—property, obliga-

tions, successions,—we find this practice of substituting a descriptive periphrasis for a technical Latin word or phrase frequently leading to confusion, and occasionally to contradiction. Thus, in Gaius, ii. 15, we read: *Omnes res aut mancipi sunt aut nec mancipi. Mancipi sunt praedia in italico solo*, etc. Mr. Mears translates thus: “All things are either things requiring for transfer the formal conveyance by copper and scale, or are things not requiring that form of transfer. Things requiring transfer by a formal conveyance are estates on Italian soil,” etc. Were this set opposite or below the Latin, there would be less risk of mistake; but separated from it at a distance of two or three hundred pages, what is there to tell the uninformed reader that he has before him a reference to the famous distinction between *res mancipi* and *nec mancipi*? Not only does Mr. Mears’ reluctance to use the original Latin in his translation hamper him tremendously in the structure of his sentence; it actually leads him into error. For conveyance *per aes et libram* was not essential in the case of *res mancipi*, *in jure cessio* being equally effectual; and *praedia in italico solo* did not mean estates in Italian soil, but estates enjoying the *jus italicum* or Italic privilege, whether in Italy or the provinces. Two paragraphs further on (ii. 17) we have, *ferè omnia quae incorporalia sunt nec mancipi sunt*, which is translated: “Nearly all incorporeal things are things not requiring transfer by a formal conveyance;” the truth being that, according to the *jus civile*, all transferable incorporeals required formal conveyance for their transfer, usually *in jure cessio*, with the alternative in a few cases of *mancipatio*. A curious result of this horror of technical words, and arising from a confusion of *mancipatio* and *coemptio* (which were both imaginary sales, but for very different purposes), crops up in the translation of Gai. ii. 115, where Mr. Mears says: “The senate, by the authority of Hadrian, . . . permitted women . . . to make a testament without going through the form of a fictitious sale.” This seems to convey the idea that the senate dispensed with the *familiae mancipatio* (described by Gai. in ii. 104) in the testaments of women, which we know was not the fact; what the senate did was to relieve women from what Cicero tells us was in his time indispensable,—preliminary *capitis deminutio* by fiduciary coemption.

In the law of obligations we encounter similar unfortunate results due to the same cause. To take but two or three instances out of many. There were three interrogative *formulae* made use of by a creditor in the classical period for imposing obligation on a surety for his debtor,—*idem dari spondes?* *idem fide tua promittis?* and *idem fide tua esse jubes?* Mr. Mears translates them. “Do you bind yourself that the same thing shall be given?” “do you become an additional debtor for the same?” and “do you become surety for the same?” It is no doubt extremely

difficult in a word or two to differentiate the significance of those three *formulae*; it can only be done by reference to the origin and progress of the verbal contract. All the more reason for adhering to the technical Latin and abjuring paraphrase. Without getting any light on the position of the *sponsor*, one might fancy from Mr. Mears' rendering that it was peculiar to that of the *fidepromissor* that he alone became a joint debtor, and to that of the *fidejussor* that he alone was a surety in our sense of the word; and yet the fact is, that in the classical law all three were joint and several debtors so far as the creditor was concerned, sureties so far as concerned the principal debtor. So far does our author's dislike of the technical carry him, that instead of using the good English word "mandate" as the equivalent of *mandatum*, he must needs convert the latter into "the contract of gratuitous agency," and the *actio mandati* into "the action of gratuitous agency." His rendering of *mandatum* is a definition, not a translation; but his rendering of *actio mandati* is neither one nor other, and only leads to confusion, seeing the *actio negotiorum gestorum* was as much an action of gratuitous agency as the *actio mandati*. Why should he make difficulties about using this technical phrase, when in the very same paragraph (Gai. iii. 127) in which he misinterprets it he does not hesitate to refer to the *actio depensi* in its native Latin? And why does he speak of *condictio* as a "personal action," and translate *condici possunt* (T. ii. 8, § 2) by "a personal action lies"? *Condictio* was not a generic name for a personal action, but indicated a particular class of personal actions; and the translator ought to be as careful to preserve the distinction as were the Roman jurists.

In the law of succession—to take again but two or three examples—we find Mr. Mears paraphrasing *sui heredes* by "co-owners of the patrimony," *heredem instituere* by "to appoint as heir," *bonorum possessio* by "praetorian possession of property," *usucapio pro herede* by "the acquisition by use known as that 'in the place of the heir,'" *legatum per vindicationem* by "legacy by way of giving the heir the right to claim it," and *legatum per damnationem* by "legacy by way of ordering the heir to give it." None of these are satisfactory renderings, though one or two of them may be objectionable more on account of their clumsiness than of their inaccuracy. As regards *sui heredes*, it is true that one or two of the Roman jurists speak of them, not as owners, but as being in a certain sense owners (*quodammodo domini*) of the family estate even during the lifetime of their *paterfamilias*. But that remark is not intended as a definition of *sui heredes*, but only as an explanation of one of the features of their position; and the phrase "co-owners of the patrimony" answers much more closely to *socii universorum bonorum*,—brothers, for example, holding in common and undivided the paternal inheritance. "To appoint as heir," again, covers *heredem sub-*

stituere as well as “*heredem instituere* ;” and yet the ideas were essentially different. “Prætorian possession of property” is a phrase quite as applicable to the possession of a *bonæ fidei* purchase from a non-owner, or to that of a party put into possession of another man’s property by prætorian authority, whether *damni infecti nomine*, or for any other reason, as to the *bonorum possessio*,—perhaps more so. *Bona* was not synonymous with property, but much more inclusive; belongings, whether property, minor real rights, or personal rights, more nearly expresses the idea it conveyed; and *bonorum possessio* was the prætorian grant to a petitioner of possession of and right to all the belongings of a party deceased, as if the grantee was in law his heir. *Legatum per vindicationem* was a bequest conceived in terms that made the legatee owner of the things bequeathed, and gave him the right to recover it by a *rei vindicatio* from any third party detaining it; to say that it gave him “the right to claim it,” is to introduce the idea of obligation, and to confound it with the *legatum per damnationem*.

We would strongly recommend Mr. Mears, before his book comes to a second edition, to try to overcome his repugnance to the introduction of technical Roman words and phrases into his translation. In every system of jurisprudence, ancient and modern, there are terms that may quite well be explained (in notes), but that cannot be adequately paraphrased in a word or two. We have before us a little treatise by a French jurist (M. Georges Lebreton) on English real property law; but we do not find him attempting to gallicize such words and phrases as freeholds and copyholds, estates in tail and estates for life, leases and releases, remainders and reversions, fines and recoveries. Mr. Mears may plead as an excuse that the Latin text is in the same volume as his translation, and that the student can confront the one with the other. But in five cases out of ten we are sure the student will not: were they in juxtaposition he might do so more readily; but they are widely separated, and many a lazy man will content himself with the translation, rather than turn back two or three hundred pages to discover the terms of the original. In any view, it is better to avoid even the chance of misapprehension.

It might be well that Mr. Mears should also reconsider some of his translations, apart from technicalities. In not a few places he seems to have failed to appreciate the meaning of his text. This is so, for instance, in Justinian’s brief title *de litterarum obligatione* (iii. 21)—a rubric which Mr. Mears erroneously renders by “of obligations contracted by entries in writing.” The text runs: *Si quis debere se scripserit quod ei numeratum non est, de pecunia minime numerata post multum tempus exceptionem opponere non potest. . . . Sic fit, ut et hodie, dum queri non potest, scriptura obligetur; et ex ea nascitur condictio, cessante scilicet verborum obligatio.* Here is the translation: “If a person has stated in writing that he owes a sum which has not been paid over to him, . . . he cannot, after a

long period has elapsed, set up a plea of not having received the money; and it thus happens that, even at the present day, as he has no redress, he is bound by the writing, and upon this a personal action is grounded, that is, of course, in the absence of any obligation contracted by words." Passing by the mistake, already referred to, of translating *condictio* by "personal action," there are in these few lines two serious errors. First, *dum queri non potest* does not mean "as he has no redress," but "once challenge (*querela*) has become impossible;" and *cessante scilicet verborum obligatione* does not mean "in the absence of any obligation contracted by words," but "the verbal obligation ceasing." No doubt *cessare* often occurs in the text as synonymous with *deficere* or *desse*, and Mr. Mears has justification for so reading it in Theophilus' paraphrase of this title. But such a reading is altogether at variance with Justinian's statements in § 2, T. *de except.* (iv. 13), and Theophilus' own version of it; which puts the doctrine in language the most unambiguous, that where a stipulation to repay money, of which receipt was acknowledged, was embodied in writing, and the creditor sued upon it (*i.e.* the stipulation), the debtor might plead the *exceptio non numeratae pecuniae* at any time within two years from the date of the writing, but not later. A *cautio* acknowledging receipt of a loan might or might not contain a stipulatory engagement to repay it; that the latter was very common may be inferred from the fact that Justinian, in one of his principal enactments on the subject (l. 13, C. *de non num. pecun.* iv. 30), speaks of the parties to the writing as *stipulator* and *promissor*. If the acknowledgment had been given incautiously, before the money had actually been advanced, and the latter continued to be withheld,—if, in a word, the acknowledgment had been given without value, the proper course for the nominal debtor to adopt was to raise a *condictio sine causa* to get back his acknowledgment (l. 7, C. iv, 30), which he was required to do, however, within two years (l. 4, C. iv, 9). If this course were inconvenient, and the *ex facie* creditor did not, within two years, take action on the *mutuum* or *stipulatio* embodied in the writing, so as to give the *ex facie* debtor the opportunity of pleading in defence that the loan had not been received, the latter might, before the two years expired, emit a *contestatio* or protest, in the manner described by Justinian in l. 14, C. iv, 30; its effect was to make his exception perpetual,—to give him the right to resort to it at any time when action was raised against him. Any such action used to be on the *mutuum* or the *stipulatio* of which the writing was, in the first instance, nothing more than the evidence. The moment the plea of no value was stated in answer, the *onus* was cast upon the pursuer of the action of proving value by evidence outside the written acknowledgment (l. 3, C. iv, 20). It was thought politic, however, for obvious reasons, to limit the time within which this *exceptio non numeratae pecuniae* might be

pleaded to five years, reduced by Justinian to two, unless by timely protest the *ex facie* debtor had reserved right to avail himself of it in all time coming. If, within the two years, there had been neither *condictio*, *contestatio*, nor *exceptio*,—the three forms of *querela non numeratue pecuniae*,—then the debtor in it was bound by the writing—*scriptura obligatur*; once challenge of it was no longer possible (*dum queri non potest*), although the action against him might still nominally be founded on the *mutuum* or *stipulatio*, yet practically his liability arose from his written acknowledgment. And if practically, why not formally? This is what Justinian seems to have thought—that since a man was bound to pay a sum of money simply because he had put his name to a document acknowledging its receipt, the straightforward course was to allow the creditor to sue upon the writing out of which the obligation had arisen, although originally that writing had been intended as nothing more than evidence of a verbal obligation between the parties. Hence the very pregnant phrases in this title, which Mr. Mears has failed to appreciate—the moment a *querela* has become impossible (*dum queri non potest*), the debtor is bound by the writing (*scriptura obligatur*); and upon IT a *conditio* will lie, the verbal obligation ceasing.

There are other passages in which we think Mr. Mears has failed fully to apprehend the meaning of his texts, and in which consequently his translation is defective; we may instance Gaius' account of the procedure subsequent to the pronouncing of an interdict, and his explanation of the *legis actio per sacramentum*. These we hope to see amended in a second edition. And we shall also be pleased to see *latini coloniarii*, *latini Juniani*, rendered by "colonial and Junian latins," instead of "latin colonists," "latin Junians;" such things are blemishes in what is likely, on the whole, to be a useful book.

Der Kampf um's Recht. By DR. RUDOLPH VON IHERING.
Translated by JOHN J. LALOR, of the Chicago Bar. ("The Struggle for Law.") Chicago, 1879.

IN December last, when engaged in reviewing Professor Holland's *Elements of Jurisprudence*, we made use of the following language (vol. xxvi. p. 600): "A curious proof of the incommensurability of English and German legal nomenclature has been recently furnished by Ihering's popular pamphlet, *Der Kampf um's Recht*." In the preface to a recent edition, the author enumerates, with pardonable vanity, the dozen or so of languages into which his lecture had been translated. English was not one of them, and yet a large part of the lecture was taken up with an encomium on our national habit of strenuously objecting to be "done;" and his methods were distinctly English. The reason was plain enough

as one read on. The pamphlet, which to the German mind was nothing less than a revelation of a new method, would, if done into idiomatic English, have been a bundle of truisms which had in the original "been obscured by a defective vocabulary." We see no reason to retract any part of this excerpt. But an addition now requires to be made. The edition of Ihering's brochure, which was before us, was the fifth. Soon after that edition was published, the translation, whose name stands at the head of this notice, appeared on the shores of Lake Michigan, and we have since been informed that another American translation exists. The present translation is very carefully done. The result is a most readable booklet. Yet it may be doubted whether the English reader will understand the version in the same sense as a German audience must have understood the original. In the first place, the rendering of the title is in itself a misnomer. A struggle for law may be understood in the case of a rebel against despotism, of a revolutionist against arbitrary rule, or even of a lyncher against the sway of legal chicane. But the sense in which the author understands his own words is given early in the pamphlet, where he distinguishes between *Recht* in the objective sense—the legal ordering of life,—law as understood amongst us; and *Recht* in the subjective sense, as the legal right of a person—concretely. It is in the latter sense that the word is used in the title of the lecture. The translator elsewhere shows much discrimination in giving the proper equivalents for this ambiguous word—sometimes by translating in both ways within the same sentence. Similarly the correlative *Unrecht* requires just as often to be translated "a wrong" as "injustice."

It may be well to take this opportunity of saying a few words concerning this, the most popular fragment of juristic literature in modern times. The leading proposition is that it is only by severe struggle that law has come into existence and has developed, and that rights can be obtained or maintained. This, to us, self-evident proposition has been much lost sight of in Germany chiefly on account of a misunderstanding of the views of Savigny and Puchta concerning the genesis of legal systems. These great civilians—in their jealousy of the hardening influence of codification, and in their admiration of the work done by the classical jurists as compared with the body of law emanating from imperial constitutions—made much of the paramount influence of custom, more especially in primitive times; talked of the law as an organism which underwent slow but sure development, not greatly accelerated or retarded by legislative interference. Now this is an unquestionable truth, perhaps the greatest verity in jurisprudence; and even an English common lawyer, who eyes consuetude askance, and will not look at desuetude, would scarcely venture to deny it, in the face of his copyhold tenure. But it is a truth not only consistent with, but

absolutely dependent on, this other, that the development of law, like the life of every organism, is the resultant of a constant struggle. An amusing illustration of the difference of view taken of this necessity for struggle is given by the author in his contrast between the conduct of an Englishman and of an Austrian, each of whom has been overcharged in a foreign hotel. While the Austrian shrugs his shoulders and does nothing more, the Englishman is depicted as spending ten times as much as the overcharge to obtain redress. "In the few pieces of silver which the Englishman refuses and which the Austrian pays, there lies concealed more than one would think of England and Austria: there lie concealed centuries of their political development and of their social development."

The mode in which the thesis of the lecture is worked out is this: it is proved that the essence of the struggle for one's legal rights consists in the feeling that any contravention of these is a violation of the personality of the complainer; that consequently the same wrong will be differently regarded according as it occurs in one sort of community or in another; that the duty of struggling for right is not only a duty to oneself, but also a duty owing to society; that the consequences of a neglect or refusal of legal right to an individual or to any class of men is the most pernicious of all social evils; and that the national sentiment of right had gradually died out or died down in Europe since the early days of the Roman Republic. We can do no more than refer to the author's remarks on the miserable quibble by which Shylock was sent away clamouring for the law which was refused him; to the history of the Roman fines *in triplum*, in fractional additions and by way of wager, and to the prevalence of *popular* actions to a far greater degree than in modern Europe. We rise from a perusal of this very charming pamphlet with the impression—which is for other reasons shared in by a large portion of the profession—that by far the most important part of a litigation is the decree for expenses; that it is the only way of punishing a dishonest debtor, and that it would seem a pity that any attempt should be made to diminish the sanction by docking the account.

The Law and Practice under the Companies Acts, 1862–80; The Joint-Stock Companies Arrangement Act, 1870; and The Life Assurance Companies Acts, 1870–72. By H. BURTON BUCKLEY, M.A., Barrister-at-Law. Fourth Edition. London: Stevens & Haynes. 1883.

BUCKLEY on the Companies Acts is such a well-known handbook to the Acts of which it treats, that it is almost superfluous to say anything further in its praise. The fact that a fourth edition has now made its appearance is an additional proof, if any were

needed, that it has proved a very useful manual to the profession. Since the last edition was published, two Acts relating to the subject-matter have been passed. The Companies Act of 1879 was the direct outcome of the failure of the City of Glasgow Bank, and is the statute which made the way clear for the Scottish Banks registering themselves as limited companies, and so taking advantage of the Act of 1862. The Companies Act of 1880, providing for the return of accumulated profits to shareholders in reduction of paid-up capital, is the latest addition to the ever-increasing mass of legislative enactments relating to companies, and it comes in for some not very complimentary remarks on the part of the learned author. In fact, he says in his preface that it is a statute whose origin, object, and effect he commends to the consideration of others, with the expression of a hope that the study may not leave them as puzzled and bewildered as it left him. It is only fair to say, however, that notwithstanding this expression of opinion, the notes which are given go a long way in explaining the purport of an Act the draughtsmanship of which is more than usually clumsy. There are few points in connection with the business to be transacted under the Companies Acts which the author does not mention; it will be a very out-of-the-way bit of practice that the practitioner will not find contained in this volume. One little omission, however, we think Mr. Buckley has made: in treating of the winding up under the Companies Acts of a society registered under the "Industrial and Provident Societies Act, 1876," he does not mention (at least we have failed to find it) that for the purposes of the latter Act the word registrar in the Companies Acts is to be read as meaning, not the Registrar of Joint-Stock Companies, but the Registrar of Friendly Societies, with whom societies under the Act of 1876 are registered. This is the more important, as mistakes are often made in regard to it; and besides, the fees payable to the Friendly Societies Registry are considerably less than those payable in the case of an ordinary winding up under the Companies Acts. In the notes on the dissolution of a Benefit Building Society under the "Building Societies Act, 1874," it might have been well to mention that in Scotland a special Act of Sederunt has recently (17th March 1882) been issued regulating proceedings in sequestrations in the Sheriff Courts under that Act.

We have no doubt that the present edition of this useful and thorough work will meet with as much acceptance as its predecessors have.

Procedure in the Court of Session. By JOHN P. COLDSTREAM, W.S
Second Edition. Edinburgh: T. & T. Clark. 1883.

THE production of a second edition of this work within a few years would seem to show that there is some demand for it. It is, of

course, on a much smaller and less ambitious scale than Mr. Mackay's well-known volumes, but it gives a considerable amount of useful information as to procedure in a comparatively small space. It will therefore no doubt supply a want which may be felt by students and others reading for examinations. We regret to see that the learned author has not mended a few faults of styles which we took the liberty of pointing out when we noticed the first edition of this book (*Journal of Jurisprudence*, vol. xxiii., p. 46). We again meet with our old friend "a box week in vacation;" and though it is stated in one place that "if a summons is *not called* within a year and a day from service, it falls," yet on another page we find that the writs alluded to are endowed on a few days in the year, at all events, with an active voice, as it is stated that "summonses can *call* on box day." "Sleeping processes" might naturally "call" when "wakened," but a summons calling itself, or anybody else, is not a usual spectacle. However, we must not part with this book without saying that it evidently shows a good knowledge of his subject on the part of the author, though we are bound to say that we respect his authority much more from his being an assistant clerk of the Court of Session, a designation which he omits from his title-page, than from his holding the respectable but not responsible position of an Extraordinary Member of the Juridical Society of Edinburgh, even though "formerly one of the Presidents."

Obituary.

THE LATE SIR ARCHIBALD HOPE, BART.—Sir Archibald Hope was the eldest son of Sir John Hope, the eleventh Baronet, who sat for the county of Mid-Lothian in Parliament for eight years, from 1845 to the time of his death in 1853. He was born on the 28th February 1808, and had therefore nearly completed his seventy-fifth year. In 1829 he became a member of the Faculty of Advocates, but during the greater part of his life he in a quiet and unostentatious way devoted his attention principally to matters affecting the welfare of the community amongst whom he lived. From 1843 to 1849 he filled the office of Provost of Musselburgh, and when his father died he succeeded him in the position of chairman of Inveresk Parochial Board. He also took great interest in county business, and was a regular attender of the general and committee meetings of the Commissioners of Supply of the County of Edinburgh. Besides being a Deputy-Lieutenant of the county, he was a Major-General of the Royal Company of Archers; and for twenty-one years—from 1856 to 1877—he acted as Lieutenant-Colonel in the Edinburgh Light Infantry Militia, now the 3rd battalion of the Royal Scots (Lothian Regiment). He was also a

Commissioner of Supply for the County of Fife, a director of the Commercial Bank of Scotland, and a director of the Life Association of Scotland.

The first Baronet was Lord Advocate of Scotland from 1626 to 1646, and it is from his youngest son that the Earls of Hopetoun have descended; while the Hopes of Amsterdam, now represented by Mr. Adrian Elias Hope, are descended from the first baronet's younger brother.

The Month.

A Curious Donation inter vivos.—A Canadian correspondent sends us a printed list of advertisements, in French and English, of sheriffs' sales of lands, containing a reference to the survival of an old French custom, by which, when the *père de famille* desires to retire from active management of his farm, he makes a donation *inter vivos* to the eldest son, stipulating for certain continued benefits to himself and his wife. The minuteness of provision for these benefits is sometimes very amusing. For example, in one case, the rent reserved is as follows: "Twenty bushels of wheat, dry, clean, good, and merchantable, sixty bushels of good fine oats, four bushels of split peas, fifty bushels of good potatoes, two hundred bushels of hay, timothy, and clover, one pig weighing two hundred pounds with the suet, one bushel of salt, one pound of pepper, twelve pounds of candles, twelve pounds of good soap, one good milch cow that calved in the spring, to be replaced in case of death, delivered on the first of May and wintered, twelve dozen fresh eggs, one good maid-servant to wait upon them; said rent payable, to wit: the wheat, ten bushels at Christmas, and the remainder in February, the oats, thirty bushels, at Michaelmas, and the remainder in January, the potatoes and peas at Michaelmas, the hay during the haying season, the pig, the salt, pepper, candles, and soap, on the twenty-second of December, the eggs when required; also to have the survivor of the said Jean Baptiste Vermette, senior, and his wife, interred with a service of a cost of thirty-six *livres, ancien cours*," etc. This sentence is so long-winded, that it is not quite certain whom the maid-servant is to wait upon—the old man and old woman, the pig, the cow, or the eggs. In another case the rent reserved is as follows: "Twenty bushels of dry wheat, clean, good, and merchantable, ground and delivered at their residence, eighteen cords of wood, three feet long from one point to the other, soft wood, except three cords which are to be of tamarac or ash, chopped in the spring, cut and split for the stove and delivered in their house, a fat pig weighing two hundred pounds with the caul, two bushels of fine cooking peas, twenty-five pounds of maple sugar, one bushel of salt, one pound of good tea, six dozen of eggs, a pair of hens, twelve pounds of soap, six pounds of candles, twelve bundles of good hay, four gallons of whisky, two pairs of men's Canadian leather boots, and two pairs of women's Canadian leather boots, one quart of lamp oil, one pound of pepper, one fat lamb, five ells of home-made cloth every

two years, nine ells of home-made linen every two years, and six ells of home-made flannel every two years; which said articles shall be delivered as follows: ten bushels of wheat in March, ten bushels at Christmas after, the wood at the first snowing, the fat pig, peas, salt, tea, soap, candles, whisky, oil, and pepper at Christmas, the sugar in the month of April, the eggs in the month of May, the hens at All Saints, the fat lamb in the course of October, the cloth and flannel at Saint Catharine's, and the linen in the month of June, the hay on demand. Moreover, to furnish them a cow after calving, every year, on the first of May up to All Saints, wintered and pastured, to provide them with a horse harnessed to a suitable vehicle, whenever they require, except in the sowing or ploughing time, to allow them pasturage for a horse," etc. In the latter case the good man and woman apparently were accustomed to wait on themselves and one another, and were indifferent about the funerals, but seemed much more exacting of creature comforts, especially in the matter of whisky. It is noteworthy that the pig in each case must weigh two hundred pounds. We should suppose that it would be difficult to fix "the first snowing" in a country where, as we are given to understand, it snows all the year round.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF CAITHNESS.

Sheriff-Substitute SPITTAL.

Prison Act, 1877.—A boy named Miller was brought before Sheriff Spittal at Wick, charged with throwing stones at and injuring a fisherman on board one of the boats in Pulteney harbour. Evidence was led, the charge was found proven, and the case was adjourned for a week for sentence. On the appointed day the boy appeared again at the bar, when he was sentenced to receive 12 stripes with a birch rod. The Sheriff in pronouncing sentence said—Stewart Miller, you were brought here last week charged with assault upon a fisherman by throwing stones at him, and striking him with a stone on the leg. The case was clearly proven, but I continued the case till to-day, not from any doubt as to what ought to be done with you, but from a hesitation as to where it ought to be done. I am averse to sending boys of your age to prison. In the circumstances, looking to the facts of the present case, and to the well-known prevalence of stone-throwing in Pulteneytown, where there is apparently no security against respectable citizens being assailed with stones in broad daylight, the imposition of a fine would be no punishment at all. The proper punishment for you is a whipping. Formerly, when we had a prison in Wick, you would have merely had to walk a few steps from this room, the whole proceedings would not have occupied half an hour, at the end of which you would have been restored to your family, a sadder but I hope a wiser boy. But that system which appears to me, and I think I may say to all who are acquainted with the facts of the case, to have been the best for all concerned, has been superseded. The Wick prison has been abolished, and in place of it we have to use either the prison of Aberdeen, or Dingwall, or Kirkwall. The Prison Act of 1877 appears to have contemplated that, in the event of any prison being discontinued, the prison substituted for it should be a "convenient" prison, in an "adjoining or adjacent county or burgh." It humbly appears to me that neither the prison of Aberdeen, nor that of Dingwall, or Kirkwall, can with accuracy be described as a "convenient prison in an

adjoining county or burgh." Aberdeen, if reached by sea, is some nine hours distant; but as in winter there is only one steamer a week, a prisoner sentenced to-day (Tuesday) would have to be detained in Wick until Friday, on which day, weather permitting, he might embark for his destination. But in stormy weather he might have to wait another week, or until such time as the steamer was able to call. On the other hand, a prisoner sent to Aberdeen by rail would, after a preliminary detention of 12 hours in Wick, have a railway journey of 15 hours to Aberdeen, *i.e.*, would not reach his place of detention for 27 hours after sentence. Aberdeen, therefore, as a place to which to send our Caithness prisoners is out of the question. Our choice must therefore lie between Dingwall and Kirkwall. Kirkwall has this advantage, that it is within the Sheriffdom. But a prisoner sent to Kirkwall must be detained at Wick or Thurso from 11 or 12 o'clock on the day of trial till 10 o'clock next day, at which hour he would, weather permitting, embark on his three or four hours' voyage to Kirkwall, *i.e.*, he would not reach his destination at soonest till the expiry of a period of 26 or 27 hours. On the whole, it has appeared to the Court that Dingwall is the least inconvenient prison to use in place of our discontinued prison of Wick. Dingwall is only 143 miles from Wick, and in ordinary circumstances is reached after a comparatively short railway journey of about eight hours. I regret that, in consequence of the regulations about whipping, I have no alternative but to send you to Dingwall, there to receive the 12 stripes with a birch rod, which appears to me to be the fitting sentence in this case. This entails a journey of, in all, close on 290 miles; but for that journey, and the very great inconvenience to all concerned, this Court is not responsible.

SHERIFF COURT OF STIRLINGSHIRE.

Sheriff-Substitute BUNTINE.

SCHOOL BOARD OF KIPPEN *v.* CHRYSTAL.

Education (Scotland) Act, 1872—Recovery of School Fees—Parochial Board.—The circumstances of the case are shortly these. A working mason, Chrystal, residing in Kippen, had regularly kept his family at school, they being of school age; but he paid no fees for several years, till at last the School Board brought this claim. He pleaded poverty; but the Board thought that a man in regular employment during good weather, whose average wage, they alleged, was 20s. a week, was thoroughly able to pay. What is further necessary to understand the case is set forth with ample perspicacity in the Sheriff's judgment. His Lordship said—The School Board in this case sue for £4, 14s. 2½d., being the fees for the education of four children of the defender Chrystal, for the years 1877-78-79-80-81 and part of 1882. It is admitted that these fees were incurred for the education of those children, and that the fees are reasonable. The first defence stated is that the defender is a poor man, and unable to pay the fees, and was so unable during the whole course of the time embraced in the summons. I am not able to give effect to that plea, because poverty is no bar in such a case. The duty of the defender was, if he was unable to pay, to have had the fees paid by the Parochial Board. The next defence stated is a more formidable one—that the pursuers are barred by *mora* and acquiescence from now claiming these arrears of school fees. After mature consideration of the evidence, I have come to the conclusion that this plea is well founded. It appears from the proof that the respondent is an outdoor mason with a wife and six children, none of whom are self-supporting, whose wages vary from 6d. per hour of 9 nine hours per day in summer, to 6d. per hour for 7 hours a day in winter—the result showing that during part of the year he is in receipt of fair wages, and that during another part of the year, and a considerable part, he is out of employment and receives no wages at all. Upon the average for the period in question—taking the testimony of the man's master, who was examined—he was earning 15s. a

week. Undoubtedly during a great part of the period in question he was in the position of a person whom the 29th section of the Act of 1872, and the 22nd section of the amending Act of 1878, were intended to benefit, and was entitled to be relieved, from the Poor Fund, of paying school fees. The defender and his wife depone that during all these years they have maintained their inability to pay the school fees for their four children on the ground of poverty, and have always refused to make any payment when such payment has been demanded. On the other hand, the clerk of the School Board and the compulsory officer depone that the School Board never admitted the inability of the defender to pay these fees, but that they were not desirous to press unduly upon him, and allowed their claim to stand over in deference to the defender's alleged poverty; and they further depone that the defender and his wife agreed on two occasions to liquidate these arrears by payment of 5s. per quarter, and actually made two said payments. This agreement is expressly denied both by defender and his wife, and the Sheriff-Substitute thinks that it is not substantiated. They admit that they, to some extent, believed in the poverty of the defender, and were unwilling to press him for payment when he was out of work, and that they held over their claim until better times. In these circumstances the important and novel question for the consideration of the Court is whether, by giving instruction to the defender's children in the face of his statement that he was unable to pay therefor, the pursuers have not waived their right to exact payment of school fees, and are not now barred from making the present claim. It is important to consider the relative position of the parties. On the one hand, the duty of the School Board, under the Education Acts, is to see that every child of between 5 and 13 years of age in their parish is receiving elementary education, and to prosecute the parents of children who fail in the statutory duty of providing such elementary education. There is thus the burden imposed upon them of investigating, so far as they can, into the circumstances of any parent who alleges poverty as an excuse for not sending his children to the Board school, because inability to pay is a reasonable excuse, and being proved, would entitle the parent to acquittal in a prosecution under the Education Acts. Under the original Act of 1872 the duty of applying for aid to the Parochial Board was laid upon the parent; under the amending Act it is by no means clear that this duty is not incumbent upon the School Board. Under both Acts, in my opinion, it was the duty of the pursuers to point out to any parent alleging poverty as an excuse for failure to educate his children, that in such a case he must make application to the Parochial Board. In the present case it is admitted that during all these years the School Board neither advised this defender to make such application, or made any application to the Parochial Board on their own account. On the other hand, in the face of the fact that the defender declined liability on the ground of poverty from payment of school fees, they gave education to his four children during these five years. I am of opinion that by so doing they must be held to have waived their claim for these school fees. There are two considerations which appear to justify this conclusion. On the one hand, if the parent was in reality unable to pay the whole or part of these fees, he was entitled to be relieved of this payment by the Parochial Board. This assistance is of the character of an advance to a pauper by a parochial board, and is therefore not repayable by the poor person, if at any time he is in a position to make repayment. It would consequently be an obvious injustice to the parent to postpone the demand for payment of a claim for which he had the right of relief against the Parochial Board, until such time that the right of relief had ceased, as it practically has after this lapse of time. Because, even if the defender was able now to satisfy the Parochial Board of his poverty during all these years, it is by no means clear that the Parochial Board would be bound under the Education Acts to make payment of fees which had been allowed to run into arrear. On the other hand, it is not unnatural or improbable that the School Board, if they were satisfied of the defender's inability to pay (and this fact must now in the circumstances be assumed against them), would prefer to

educate his children without payment, without going through the form of applying to the Parochial Board. In the parish of Kippen the incidence of the poor-rate and the school-rate is identical, and the offices of inspector of poor and clerk to the School Board are held by the same person. The School Board, therefore, had no interest to demand payment of these fees from the Parochial Board, or institute proceedings for the purpose of determining from which pocket the ratepayers should defray the expense of educating the defender's children. In the view of the evidence which approves itself to me, I think that the pursuers have failed to prove that the defender or his wife on his behalf ever agreed to pay the school fees now claimed, and I now dismiss the pursuers' claim, because I am of opinion on the evidence that their claim is barred by acquiescence by reason of their giving the education for which payment is now sued for in the face of the admitted declaration of the defender that he was unable to pay therefor, and by reason of their failure to take from him any acknowledgment of indebtedness or promise to pay when his circumstances would permit. I must not be held, therefore, to give any opinion upon the important general question which is involved in the contentions of the parties, viz., whether or not School Boards are justified in allowing school fees due by parties alleging inability to pay to run into arrears for years as in this case. I would only say that it appears to me that this practice is unjust, both to the ratepayers and the defaulting parents. To the parents, because they may be deprived of the relief which the Act affords them of assistance from the poor fund; and to the ratepayers, because if the present claim of the School Board had been sustained, the ratepayers of the years embraced in this summons, from 1877 to the present time, would be taxed for the education of these four children, while the ratepayers of the present year would be benefited by the sum which is now sued for being credited in their favour in the annual accounts, without any possible recompense to the ratepayers of the previous years. Nor am I obliged to consider whether the defender was entitled to be relieved from the poor fund of the whole or any part of the sum necessary to educate his children, because I think on the evidence that the School Board waved their right to demand these school fees, and consequently that the defender is entitled to be assoilzied from the present claim.

Act. Barty & Thomson, Dunblane—Alt. D. W. Logie, Stirling.

SHERIFF COURT OF CAITHNESS.

Sheriff THOMS and Sheriff-Substitute SPITTAL.

MANSON v. HENDERSON.

Mercantile Amendment Act, 1856—Sale of Horse—Must seller put into neutral custody on rejection by buyer?—Where he put into such custody and removed without notice to or consent of buyer, held that that barred action for price—Separatim, that evidence of rejection after a trial and discovery of a known though undisclosed defect justified refusal to pay price, and the section of Mercantile Amendment Act of 1856 inapplicable.

“Wick, 23rd January 1883.—Having considered the process and heard parties' procurators, Finds (1) that in September 1882 the pursuer had a mare which he wished to sell, and that on Marymas market day he and John Henderson, the defender's nephew, had some conversation about the mare, at Thurso, the defender being present; (2) that a day or two thereafter the defender went to pursuer's house at Calder, and saw the mare, which was shown him by pursuer's son, in the absence of the pursuer; (3) that a few days after, the defender returned to pursuer's house and again saw the mare, in the presence of the pursuer; (4) that on 3rd October the defender again went to pursuer's house, and again saw the mare, in the presence of the pursuer and his wife, and after some bargaining agreed to purchase the mare for £20 sterling, the price to be paid on delivery of the mare on the day of Watten market, in November, it being stipulated that the defender was to have the use of the mare for a few

days, and the pursuer the use of her for the rest of the time between the date of the sale and the date of delivery; (5) that the pursuer gave no warranty of the mare, and that the defender was informed by the pursuer before he purchased the mare that she had a 'habit' of working with her neck; (6) that some time after the sale the defender took away the mare, and after keeping her for four or five days returned her to the pursuer; (7) that on the day of Watten market the mare was tendered by the pursuer to the defender, who refused to take her, and that the mare was then taken by the pursuer to Halkirk stables, where she remained for four days, after which she was removed by pursuer to his own premises at Calder, where she now is: (8) Finds it not proved that she has been worked by the pursuer since the date of said removal: Finds in point of law that the defender was not justified in refusing to accept delivery of the mare, and to pay the price: Repels the defences. Decerns against the defender in terms of the conclusion of the Petition: Finds him liable to the pursuer in expenses, allows an account thereof to be lodged, and when lodged remits the same to the auditor of Court to tax and report, and decerns.

“CHARLES GREY SPITTAL

“*Note.*—I think it is proved that the defender was made sufficiently aware before he purchased the mare that she had a 'habit' of working with her head or neck. The name of that habit, viz. windsucking, was certainly not told him; indeed, though both pursuer and defender saw the habit, they were not aware what it was technically called until they consulted persons more skilled than themselves in horses' habits and diseases, and I think the mere inability to name the 'habit' is of no consequence when the habit itself was made known. In the circumstances of the case, I think the pursuer is not barred from suing on account of having removed the mare to his own stables instead of keeping her at Halkirk. The pursuer has not worked the mare, and his conduct has certainly the merit of having saved considerable expense. C. G. S.”

On appeal the Sheriff (Thoms) reversed, and issued the following interlocutor and note:—

“The Sheriff having resumed consideration of the defender's appeal, with reclaiming petition for him, and answers thereto for the pursuer, sustains said appeal, and recalls the interlocutor submitted to review: Finds (1) that on or about 3rd October 1882, the pursuer sold, and the defender bought, a mare about seven years old, at the price of £20, which is to be presumed, in default of any proof to the contrary, was the value of a sound horse of her kind, the mare to be delivered on the 7th November, subject to the defender's getting her on trial for a few days' work between these dates; (2) that on or about 9th October the pursuer gave the defender the said mare on trial, and on or about 13th October the defender returned the mare to the pursuer, and gave intimation to the pursuer of a defect he had discovered on trial, namely, that the mare was a windsucker, and that he refused to accept of her; (3) that the pursuer was all along in the knowledge of this defect in the mare, although he was not aware of its technical name; (4) that the mare is a windsucker, and that windsucking is a fault, taking from the value of a horse, and preventing the horse being considered as sound; (5) that on 7th November the pursuer, acting upon legal advice, which he took in the meantime in consequence of the defender's intimation of the discovery of the fault he had made on trial of the mare, tendered delivery to the defender of the said mare, and that she was then and there again rejected by the defender in consequence of being a windsucker; (6) that immediately on such rejection the pursuer put the mare into neutral custody at Halkirk; (7) that the pursuer allowed the said mare to remain in said neutral custody for four days, and thereafter removed her from it without intimation to or the consent of the defender, and has retained possession of the mare ever since; (8) that by thus removing the mare from neutral custody in the pursuer's state of knowledge, he has barred his claim against the defender for the sum of £20 as the price of said mare; and (9, *Separatim*)

that even if his claim in this action be not so barred, the pursuer is not entitled in the circumstances to prevail in his demand against the defender for the price of the said mare: And therefore assoilzies the defender from the conclusions of this action, and decerns with expenses in his favour as the same may be taxed.

GEO. H. THOMS.

“Wick, 21st February 1883.

“*Note.*—The plea in law of this action is—as Lord Young remarked in the case of *Rankin v. Caledonian Railway Coy.*, 1 November 1882, 20 Scot. Law Reporter, p. 40—the first demanding consideration. The only distinguishing circumstances from the plea urged in that case are two: *first*, that failure as regards neutral custody is alleged against a pursuer and not a defender; and *secondly*, that while the mare was placed in neutral custody by the pursuer on 7th November 1882, after the defender refused to take delivery on that day, and a letter, dated 7th November, intimating this was sent by the pursuer’s agents to the defender, the pursuer on 11th or 12th November, at his own hand, and without the consent of the defender, took her out of neutral custody, and has since kept her in his own stable and custody.

“The other circumstances of the case are briefly these. The sale took place on 3rd October 1882, but delivery was not to be given till Wester Watten market day, on 7th November 1882—more than a month after the sale—during which time the pursuer was to retain the mare, as he required her work till then, subject to giving the defender trial of the mare for four or five days in the interval. On this agreement the defender got possession of the mare from 9th till 13th October; and on the latter date, after he had completed the trial for which he had got the temporary use of the mare, he returned her to the pursuer. The defender then intimated to the pursuer the objection on which he then and afterwards rejected her (see pursuer’s evidence, p. 10 E F, 11 A E, 12 A C; also William Sutherland’s evidence, Proof, p. 20 *et seq.*).

“The question whether a seller, as distinguished from a buyer, must, on rejection by the latter, put the subject of sale into neutral custody, has not, so far as the Sheriff can discover, been decided. And while strong considerations may be urged on both sides, there seems no principle or authority for holding that the obligation to put into neutral custody does not lie as strongly upon a seller as on a buyer. The pursuer here was of that opinion and acted on it. The object as regards both is the preservation of the *status quo*.

“From the interlocutor of the Court in *Hamilton v. Robertson*, 31 May 1878, 5 Rettie 843, which was an action by a seller against a purchaser, it would appear that to preserve this *status quo* the parties arranged that the horse be sold, and the free proceeds paid to the seller, leaving him his action against the buyer for the balance. In the same way it is shown that a mare rejected by a purchaser was sold under warrant of the Sheriff in the previous case of *Robeson v. Waugh*, 30 October 1874, 2 Rettie 67. In the latest case raised by a seller, *Croan v. Vallance*, 18 May 1881, 8 Rettie 700, the Lord Justice-Clerk said: ‘The pursuer, when the horse was sent back to his stable, did not put it out to livery with some neutral party, but kept it at his own stables.’ This point was not, however, purely raised so as to be matter of decision, as the pursuer in that case had used the horse in his own business after its return. In the present case the Sheriff-Substitute has given, it is thought, undue weight to this last element, because he has, on the ground of the present pursuer’s not having used the mare, held that the withdrawal from neutral custody without the defender’s consent was competent without prejudicing the present claim to the price. It is this withdrawal from neutral custody at his own hand which in the Sheriff’s opinion turns the scale against the pursuer here.

“There is a very interesting and instructive discussion of the law on this point in Mr. Guthrie’s *Select Sheriff Court Cases*, p. 520, in a case of *Cuthill v. McLachlan*, 31 July 1874. Although differing on other points, both the Sheriff of Lanark and the Sheriff-Substitute Mr. Lees are at one on the point of neutral custody being the remedy alike of seller and buyer. The Sheriff-Substitute

says, p. 522: 'In short, what the pursuer should have done is, he should have sued for the price of the horse and any outlay he had incurred. But then, if so, he must either at once have put the horse at livery, or sold it, and sued for the difference in price if the second sale was worse than the first. It is plain he knew this was his remedy, for on 20th April he caused a letter to be written to the defender intimating his intention to take this course.' The Sheriff again, p. 526, remarks: 'The best and usual, if not the only proper way to preserve the rights of both parties is for the seller to have the rejected article sold, and that if possible judicially, and to sue the buyer for the difference, if any, between the contract price and that which it realizes.' The arguments on the other side, which are very weighty, are fully stated, as well as the hesitation felt by the Sheriff in dealing with such a difficult question.

"Our law has got into its present state on this point from the attitude which our Judges have assumed towards the equitable *actio quanti minoris*, which we have hitherto hesitated to adopt from the Civil Law. Stair's Inst. i. 9, 10 and 11; Erskine's Inst. iii. 3, 10.

"In this case the fact of the defender's rejection after trial is proved by the pursuer's having gone and taken legal advice between the trial and the date of his offer of delivery on 7th November. This circumstance removes any doubt which would have otherwise existed. He acted upon this advice, and intimated that he did so to the defender. Yet, notwithstanding this, the pursuer after four days took his mare out of neutral custody without intimation to the defender and without his consent, and took and has retained possession of the mare in his own custody ever since. Lord Young in Rankin's case is careful to say, that if the circumstances were such as to show that private as opposed to neutral custody was 'the understanding of the parties, and that they both assented to it, I should hold the question of neutral custody to be at an end in any case.' The circumstances are exactly the converse here, for if there be any consent to be held as proved or presumed here, it is to neutral as opposed to private custody. Hence the Sheriff has, irrespective of any obligation on the seller to place in neutral custody, sustained the defender's plea in bar of this action.

"But, as there is unfortunately no appeal in this case, and the Sheriff has therefore considered it with more than usual anxiety, he has gone further in his interlocutor and given a decision on the merits. He regrets that here again he differs in opinion from the Sheriff-Substitute. The pursuer's case is, that his explanation of a restlessness of head was in effect a disclosure to the defender of the windsucking fault in the mare. This implies that the pursuer knew of the fault, and that being so, he cannot get the benefit of any limitation of warranty under the Mercantile Amendment Act of 1756 (sec. 5). There was here indeed no express warranty; but knowing that the mare was defective, that Act provides that he shall be held to have warranted her quality or sufficiency.

"In addition a trial was here stipulated, and as the result of that there was the discovery by the defender of the fault of windsucking, and the intimation of rejection on that account made to the pursuer, which caused him to take legal advice on the subject after that rejection, and upon which he acted when he tendered the mare on 7th November. The Sheriff holds that this discovery on trial was sufficient justification of the rejection after trial and the subsequent rejection on 7th November. So that, irrespective of the plea in bar, the Sheriff has on the merits assoilzied the defender."

THE JOURNAL OF JURISPRUDENCE.

CAPACITY TO MARRY.

IV.

(Continued from vol. xxvi. p. 629.)

THE compilers of the Austrian "Buergerliches Gesetzbuch," which came into force in 1812, looked for their model much more to the Code Napoleon than to the Prussian "Landrecht," and this is more particularly the case in regard to its provisions on the law of marriage, which are substantially those of the Code Civil. In regard, however, to its statement of the criterion of the personal statute in general, it is more definite and precise than the latter Code, following in this rather the pattern of its elder sister of Teutonic race. Article 4 (as translated by Westlake) provides: "The civil laws bind all the citizens of the dominions for which they are promulgated. Also citizens remain bound by these laws in what they do out of the dominions of the State, so far as their personal capacity to do it is restricted by such laws, and as what they should do may produce legal consequences in these countries. How far foreigners are bound by these laws will be determined in the following chapter." This is followed, in article 34, by a reciprocal enactment (referred to in article 4) as to the capacity of foreigners within the State. "The personal capacity of a foreigner is, in general, to be judged according to the law of the place to which he is subject by reason of his domicile, or if he has no domicile of his own, by reason of his birth, that is to say, so far as this Code does not lay down a different rule for the particular case." Personal capacity in relation to marriage has no separate article devoted to its regulation, and therefore falls under these general provisions. The marriage of a domiciled Austrian abroad is thus good only if his capacity be recognized by Austrian law, and conversely, that of the foreigner in Austria only if he be capable by his own law. For ascertaining the state of the foreigner's

capacity, the Austrian law has a provision (enacted by *Hofkanzleidekret* in 1814, and extended by another in the following year) for carrying the principles of the Code into practice, similar to those of the Prussian law of 1854, by which the foreigner proposing to marry, whether a native or another foreigner, in Austria is required to satisfy Austrian law as to his domiciliary capacity to do so (Stubenrauch, *Comm. zum Allg. Oesterr. Buergerl. Gesetz.* i. 126).

Should the foreigner seeking to marry there be by his own law a minor, he must produce a properly attested consent of his parents, guardians, government, or otherwise required by the law of his domicile. So far, this is merely the consistent working out of the principle of the personal statute in that particular direction. But here there occurs a provision peculiar to Austrian law (*Gesetzbuch*, art. 51), to the effect that should the minor be prevented by physical impossibility arising from the interruption of communication with his native country caused by the existence of a state of war, or a revolution, or the like, from producing evidence of the required consent, the Austrian Court, to which, by his rank and by his residence there, he is subject, will appoint for him a "*Vertreter*" (a sort of *curator ad litem*, or *ad hunc effectum*), whose duty it will be to declare before the appropriate tribunal his consent, or his refusal to consent, to the proposed marriage. This arrangement has the effect, by the fiction of the *Vertreter*, of putting the foreign minor in the same position as a native, and with this consequence, that, should the *Vertreter* refuse to give consent, the minor may then avail himself of the immediately following article, which enacts that, when any consent required by a minor is refused, the intending spouses may, if they think themselves thereby aggrieved, apply for an inquiry to their appropriate judge ordinary (*ordentlicher Richter*—*Gesetzbuch*, arts. 51 and 52; Stubenrauch, i. 122). This provision as to minors is in derogation of the general rule of article 34. It is therefore to be strictly construed, and is not to be extended beyond the instances for which it is expressly enacted, as, for example, to persons who may stand in an analogous position, such as prodigals; or where the foreign legislator has attached the sanction of nullity to a marriage contracted without the permission which he has required, for the want of such consent is to be regarded as an *impedimentum dirimens*. What is here had in view is the law in force in some of the smaller German States, such as Wurtemberg and Bavaria, forbidding their subjects marrying abroad without the consent of the reigning sovereign.

The forms of marriage by Austrian law are under the regulation of article 37 of the Code, which enacts that all contracts made abroad between foreigners, or between Austrians and foreigners, are to be judged according to the law of the place; that is to say, it puts them under the general rule of *locus regit actum*, with the qualification that no other law than that of the place of contract has been expressly stipulated for at the time of concluding the

contract, and that it does not contravene the provisions of article 4 as to the personal capacity of the contracting parties. The former of these provisions would appear to leave the door open for the doctrine of Savigny, that the observance of the forms of the *lex loci contractus* are facultative and not imperative, and that Austrians marrying abroad may, by their own arrangement, make a valid marriage according to Austrian forms, though these may not be sufficient by the law of the place of celebration.

A decision of the Supreme Court at Vienna, of 6th March 1878 (*Jour. de Dr. Int. Privé*, 1879, p. 500), shows Austrian law following that of France, in holding that the domestic law of *each* party must be satisfied as to his or her capacity. A Hungarian Jew who had been resident in Bohemia for several years, had married a Protestant Prussian woman in Berlin. By Hungarian law, as well as by the Austrian *Gesetzbuch*, Jews are forbidden to intermarry with Christians, while no such disability exists in Prussia. There was thus a domiciliary incapacity on the part of the man, but none on the woman's part. The Austrian Supreme Court held the marriage null. The decision is strictly one in Hungarian and not in Austrian law, unless, indeed, the judgments of the Supreme Imperial Court in appeal from any inferior one, are binding on those of all the provinces, on the principle recognized in Scotland in regard to judgments of the House of Lords in the case of *Virtue v. the Police Comrs. of Alloa* (1 R. 285).

The case is, however, in the inferior portion of its career, a peculiar and curious one. It was raised, in the first instance, in the local tribunal of Prague, on the woman's suit for nullity, no doubt induced by her husband's having been sentenced, immediately on their return from the celebration of the marriage in Berlin, to three years' imprisonment for defrauding an insurance company of which he was a director. It would appear, as far as can be gathered from the short report of the case in the *Journal*, that the domicile of the man, as such regulative of his personal capacity, was taken to be that of origin, in Hungary. According to our notions, the Courts of Bohemia would have had no jurisdiction, and the pursuer would have been told she might apply to the Hungarian Court of her husband's domicile of origin. Does the fact of the case having been entertained in the Supreme Court on appeal from the Bohemian Court, go to show that in Austria jurisdiction in nullity of marriage is not founded exclusively *ratione domicilii*?

The doctrine of Bar, that the wife, though incapacitated by her own law, becomes *capax* by that of her husband, seems in one instance at least to have met in Austrian Courts the same fate as in French—rejection as a *petitio principii*. But this decision seems to have been followed by another in the same Court in the same year, 1876, which is in direct conflict with the former one, and involves the affirmation of Bar's doctrine

(*Jour. de Dr. Int. Privé*, 1877, p. 76; 1881, p. 172). The parties were princely personages, and from this circumstance the case seems to have got twice reported in the *Journal*, at an interval of four years; the one report giving the names of parties and places, while the other disguises them.

The establishment of Italian independence and the union of the various small States of the peninsula under the House of Savoy, speedily bore its fruit in the field of jurisprudence in the compilation of the Italian Code (*Codice Civile del Regno d'Italia*), which came into force on 1st January 1866. Profiting by half a century's observation of the working of the older Codes, its compilers have remedied many of the shortcomings of these; and the result of their labours is a product more complete than its predecessors, embodying the principles evolved in the progress and extension of international intercourse in Europe, which commenced on the opening up of the Continent at the close of the Napoleonic wars. Under this influence the Italian Code is fuller and more detailed in its provisions in those matters which concern private international law.

Article 6 contains the general provision as to civil status and capacity: "The status and capacity of persons, as well as their family relations, are regulated by the laws of the nation to which they belong." This provision introduces us to the novel principle in jurisprudence which was the outcome, in that sphere, of the new factor in political ideas which had emerged in the second quarter of the century—that of nationality, of whose operation the unity of the Italian kingdom is still, in the political sphere, the most prominent manifestation. The principle, as a criterion of the personal statute, is distinct from that of domicile as exhibited in German law, and may in certain cases come into conflict with it; but both are alike in their differentiation from the (former) English and American principle of carrying the working of the rule of *locus regit actum* into what to the Continental jurist is the proper sphere of the personal statute. In this department the Italian legislator has accomplished what none of his predecessors have attempted. He has made complete provision both for the marriages of Italians abroad and of foreigners in Italy. These provisions occupy a short chapter to themselves, the first article of which, No. 100 of the Code, is virtually the same as article 170 of the French Code; that is to say, that the marriage of an Italian subject abroad, either with another subject or with a foreigner, is valid if celebrated according to the forms of the *lex loci*, provided it does not contravene any of the *dirimant*¹ prohibitions of the Italian law, and that the prescribed publications have been duly made beforehand.

Article 102 says expressly, "The capacity of the foreigner to

¹ This word has become naturalized, as spelt above, in French, but I have not yet seen it used by any English writer. A purist might prefer to write "*diriment*."

contract marriage is determined by the law of the country to which he belongs;" but with this important qualification, that he is subject, when proposing to marry in Italy, to the same prohibitions as the Italian subject. The disabilities which may prevail at the foreigner's domicile, or, according to the Italian conception, in his State, will be accorded recognition by Italian law to the effect of invalidating the marriage. Moreover, if, though free to contract by their own law, the parties, or either of them, come under any of the prohibitions of the Italian law enumerated in the articles devoted to that subject—55 to 69—they are in the same position as if their capacity had been struck at by their own law. This is a departure from strict consistency in the application of the personal statute. It is, in fact, an introduction of the American theory—making the *lex loci* the rule of capacity, in so far as it is restricted by its provisions. It affords also an exemplification of the converse of Wharton's theory, when he maintains that no national law is bound to recognize, in the case of any person contracting marriage within its jurisdiction, the incapacities attached to them by any foreign law; for it is imposing its own disabilities on the foreigner, while in theory recognizing the personal statute as the determinant of capacity. Wharton's theory must necessarily always work in favour of freedom, while that of the Italian legislator will, when the capacities of the foreign law in question are wider than its own, operate in restraint.

Article 103 contains a provision similar to those supplied to the Prussian and Austrian laws by legislation subsequent to their Codes. "The foreigner desiring to contract marriage within the kingdom must present to the proper civil authority (*all' uffiziale dello stato civile*) a declaration by a competent authority of the country to which he belongs, which shall show that, according to the law to which he is subject, no prohibition exists to his intended marriage." The remainder of the article provides that, when the foreigner intending marriage has his residence within the kingdom, he must, to ensure its validity, make the publications required for Italian subjects. This implies that where the parties are only transient visitors the publications are not required, all that is necessary then being due compliance with the civil forms which are prescribed for the actual constitution of the marriage, and which are similar to those of the French Code.

An eminent Italian jurist (Fiore, French translation by Pradier-Fodéré) affords us a clear and exhaustive commentary on this branch of Italian law as enacted in the Code. That marriage, with all its consequences, personal and patrimonial, falls to be regulated by the *lex domicilii* as the personal law of the parties, he regards as a *communis opinio*, running through all previous European jurisprudence, with the partial exception of England; and it is the decision in *Brook v. Brook*, in the lower Court (to which he refers), which apparently restrains him from making a full exception of

English law. On the former principle of the *lex domicilii*, the new Italian one, of what may be called the *lex patriæ*, which makes the national and not the domiciliary law the determinant of capacity, is of course to him a beneficial advance due to the progress of jurisprudence in Italy. "As regards the capacity of the parties," he says, "all admit that it ought to be regulated by the personal law;" and by the personal law of both parties, as well of the woman as of the man, for "although the woman by the marriage acquires the nationality of her husband, her capacity relative to the marriage must be tried by the law of her own country, because she loses her own nationality only after she has contracted the marriage." Marriageable age arrives in Italy for a woman at fifteen; but a woman whose own national law fixes it earlier may, according to Fiore, marry in Italy before fifteen, if old enough by her own law; for example, a Scottish girl could marry in Italy at the age of thirteen. The only exception is where the foreign law accords a capacity which would be contrary to the principles of public order of the country which is asked to recognize it—where it permits a man to marry more wives than one, or a wife within the forbidden degrees; or in the converse aspect, where it imposes prohibitions which are political or penal, such as civil death or the American proscription of marriages between white and black. The disability arising from non-marriageable age, though among those referred to in article 102, which will be imposed on the foreigner marrying in Italy, though not laid on him by his own law, is therefore not classed by Italian jurists among *impedimenta dirimentia*, and will not be so enforced against him. This is illustrated by the terms of article 68, which permits the king to grant a dispensation from that disability down to the Canon-law ages of fourteen and twelve. The absence of the disability by the foreign law is equivalent to a perpetual royal dispensation from it to the foreigner in the eye of the Italian law. To the opposing theory of the *lex loci contractus* he takes the typical exception of its opening the door to violation of the national law as regards the prohibited degrees.

Fiore's whole doctrine is based on the proposition that marriage is not a contract merely, but a change of status. A person's capacity to contract marriage is an inherent part of his national character, and cannot be shifted off and on every time he is whirled by an express train over an imaginary line into the domain of another law. It can be changed only by a change of the nationality of which it forms an inherent and inseparable quality. This of course applies also not only to the intrinsic validity of the act of marriage, but to relations between the spouses, legitimacy of offspring, and the rest of the consequences of the acquisition of the status of marriage. "The individual clothed with Italian nationality," he says, "cannot withdraw himself from the power of our law, merely because he has contracted marriage in a foreign territory, since he cannot put off his Italian character by perform-

ing a civil act which concerns the nation to which he belongs; nor can the sovereign of a place where an Italian is domiciled any more assume a power of subjecting him to his law." The concluding portion of the sentence points to the manner in which the Italian principle of nationality may come into conflict with the principle of domicile adopted by other countries.

All that belongs to the formalities of the contract Fiore leaves to the *lex loci*, but in this part he agrees with Savigny that a particular religious rite prescribed by the national law is of the essence of the contract, and cannot be evaded by a marriage abroad in disregard of it. The principle of this is, that in such a matter it would be inept to invoke the rule of *locus regit actum*, since the question is one not of the mere external forms of the act, but of a condition indispensable to the legal existence of the act itself: the parties cannot withdraw from its operation by crossing into a foreign territory with the intention of committing a fraud on their own law. A particular form of religious ceremony may be attached by a State as an absolute condition to the marriages of its subjects, and other States are in such case bound by the principles of international law to enforce it.

French law, as we have seen (*supra*, vol. xxvi. p. 624), will not hold null a marriage of French subjects abroad merely from want of the publications and registrations required—under pecuniary penalty—by the Code in the case of marriages at home, unless there has been shown an intention to evade the provisions of the law in this respect, and then it will hold such a marriage null. Thus, of the prohibitions enumerated in the chapter referred to in art. 102, there are left as *dirimant* only those arising from prior marriage and the forbidden degrees. To this extent French and Italian law are entirely in accord. But Fiore goes further than the French doctrine, being of opinion that such a marriage of Italian subjects would not be invalid even though it were proved that they went abroad *animo deliberato* to evade the domestic forms which are intended to give publicity to marriages. The reason he gives for this opinion is that the fine imposed on those who omit these forms—200 to 1000 *lire*—is sufficient sanction for the evasion of the law, which is properly one of form only, and not of essence.

In Italy as in France, marriage is dissoluble only by death, the sole remedy given being separation from bed and board (*separazione personale*). But in Italy this is the enactment of the Code itself, displaying the still powerful influence of the Romish Church, and is not a fruit of later and retrogressive legislation as in France. The question has thus presented itself to Italian as to French lawyers; whether the foreigner legally divorced in his own country could remarry in Italy. Opinion there seems to have vacillated as in France, till it has now finally set in the same direction, namely, that such a marriage is valid in Italy (Fiore, p. 233; Esperson in *Jour. de Droit Int. Privé*, 1880, p. 344). Among the considerations

taken account of by the latter jurist for not holding it a matter of public morals to forbid a person divorced to remarry during the lifetime of the other spouse, is that the Teutonic nations which permit divorce are as a rule higher in their sexual morality than the nations of Latin race who forbid it.

The marriage law of Belgium is, with some departures in detail, that of the Code Napoléon; and being so, it of course possesses one marked point of distinction from the present law in France, in that it sanctions divorce. That it is in all points identical with that of France in regard to the principles which rule capacity to marry, may be gathered from a single report from the Court of Brussels in the *Journal de Droit International Privé* for 1876 (p. 298).

The theory of the personal statute—which, with him as with the Italian jurists, is the *lex patriæ*, not the *lex domicilii*—as the regulator of personal capacity in regard to marriage is adopted by the most eminent of Switzerland's writers on Private International Law—M. Brocher, professor in the University of Geneva, and president of the *Cour de Cassation* there—in an article in the fifth volume of *Revue de Droit International et de Législation Comparée* (p. 137 et seq.), which now forms part of his work on the whole subject of Private International Law. He there, in discussing the question of whether the national capacity of both spouses, or that of the husband only, is to be taken into account in computing the competency of a marriage, though failing to pronounce definitely in favour of either, shows a leaning towards the latter view which, as we have seen, is that of Savigny, whose pupil and follower M. Brocher is. To admit the other view would be, he thinks, to introduce a source of conflict and uncertainty into the jurisprudence of the marriage relation. He does not explain how he regards this source of mischief as likely to act. I presume the consideration is the plain one, that where the laws of two States have to be taken into account, there is a source of difficulty and conflict which would of course be absent where one only is consulted. It is a further and equally plain consideration that the existence or possibility of conflict between differing laws must operate in restraint of marriages between persons having different personal laws. But on the other hand, it is more strictly in conformity with the theory of the personal statute that it should apply to the one sex as well as to the other, and particularly, when the object of the personal statute is a protective one, that it should apply to the weaker sex as well as the stronger. This able writer treats the subject in a broad and philosophical manner that reminds us of his master. "S'agit-il," he says, "de protéger la personne contre les dangers provenant des faiblesses de l'âge ou d'une altération dans les facultés physiques, intellectuelles ou morales, nous ne voyons pas pourquoi la loi personnelle de la femme ne serait pas écoutée. Il en a de même si l'empêchement a pour but de prévenir une perturbation morale provenant de la possibilité du mariage, ce qui

peut avoir lieu, par exemple, en cas d'adoption ou de profession religieuse." He is of opinion that Savigny's doctrine, however, was involved in the terms of the *Concordat* of 1842 between the various Swiss cantons. He however preserves his scientific attitude towards the question by sounding a note of warning against basing a preference for that rule on the apparently practical ground that it is in the jurisdiction of the personal law of the husband that the validity of the marriage has most chance of being impeached, since it is there that its intention is to be carried out, and that the status of the spouses is to have its seat and to produce its effects. For here we are brought face to face with two other important questions on the subject of jurisdiction: *first*, whether the Courts of the husband's nationality are the only Courts competent to entertain a dispute on the question of the capacity of the parties? and, *secondly*, granting that they are, is their own law the only one which they could, or are bound to, apply to its solution?

The attractiveness of the subject has led me rather further afield in the investigation of foreign law than I had at first contemplated. I propose in a final paper to discuss shortly which of the two theories of the determination of matrimonial capacity—that of the *lex domicilii* (or *lex patriæ*), or that of the *lex loci contractus*—has, from the point of view both of scientific principle and of practical utility, the higher claims on the preference of the legislator and the jurist.

(To be continued.)

POLITICAL ETHNOLOGY.

THE INFLUENCE OF RACE ON THE DEVELOPMENT OF LAW.

(Continued from page 64.)

THE influence of race in the development of municipal law is no less marked than in that of international law, and is a factor in the good government of any country which must, more and more, receive the attention of legislators. As an abstract proposition it is in many ways, and by a large variety of writers, admitted. It is a trite remark that the civil law is a pure development of the genius of the Roman people; the laws of property, more especially those relating to land in Russia, are the outcome of the bent of the Slavonic mind; free representative institutions, and the laws which point to the political equality of the constituent members of the community found in Great Britain, are but the practical expression of the national aspirations of the Anglo-Saxon race. But the principle which we have stated, and which in theory is almost universally conceded, has been too often forgotten in the formulation of positive laws—more especially in states composed of diverse nationalities, or where one race has a commanding influence in the construction of laws for another. Every race,

every true nation, must have its own ideal educed by the universal law of evolution from its environments, from its common law, its customs, necessities, race peculiarities, and idiosyncrasies; and in obedience to the same law of specialization it ought to be permitted to develop its national life in accordance with its native requirements, its national cast of thought, its natural surroundings—spiritual, intellectual, and physical. Wherever this development is interfered with by extraneous power, commotion, confusion, anarchy result; civilisation is retarded, and the well-being not only of that particular race, but of mankind as a whole, is damaged. The proportion in which ethnological facts have formed the basis of the municipal law of any country, is the ratio of the material, intellectual, and moral prosperity of that country. Where the genius of the race has been outraged, there the spirit of misrule prevails. And this is so whether the laws have been made by native rulers or by a foreign government. Frequently, indeed, in the latter case, it is not so much because an alien has legislated for the country—though that in itself has always an important effect—as that that alien race is necessarily out of sympathy with the people for whom they make laws, and that these laws reflect this lack of sympathy.

“There are,” says Professor Lorimer, “no historical examples of political assimilation between alien races being affected otherwise than either by absorption or amalgamation. Mere conquest has always been wholly ineffectual. Where there has been no admixture of blood, the absence of the *idem sentire* has continued to prevent the *idem velle atque nolle*.” What has been called the Neolithic invasion of Europe from that cradle of the race—the great table-land of Asia—comprised two main hordes, the Iberians and the Aryans. And these may be subdivided as follows:—1. Iberians—(a) Basks, (b) Moors, (c) Berbers; 2. Aryans—(a) Latins, Dorians, and Ionians, (b) Kelts, (c) Kymry, (d) Teutons, (e) Slavs. Now, trace as we may the history of the various branches of these two great groups, we cannot discover one single illustration of political assimilation of any two or more of them other than by absorption or amalgamation. There is an instinct of race to reject the laws and institutions of aliens. Conquest may seemingly accomplish it for a time, but the assimilation is never a reality, and the end is the freedom of the conquered nation to follow the path of its own ideal, or the wholesale expatriation of a people from their territory, or the total extermination of the weaker race.

But let us take a few concrete instances from the history of recent times. The record of Turkish conquest in Europe is a case in point. So long as the various races of South-Eastern Europe conquered by the valiant and chivalrous Osmanli—for they were both when first they crossed the Dardanelles, although, alas! the mighty are fallen in these degenerate days—so long as these races

had respect paid, in return for a heavy tribute rigorously enforced, to their traditions, their laws, and their local institutions, there was comparative tranquillity and material prosperity in their fair lands. But when the Sultans and their pashas began to impose Moslem laws on unwilling peoples, they encountered a fierce though often fitful opposition, fanned at times into ineffectual revolts. Insurrection begat anarchy, that oppression; and so ran the hideous tale of remorseless tyranny, accompanied by unparalleled cruelty on the one hand and deathless hatred on the other. With each succeeding decade, one conquered race after another succeeded in throwing off allegiance to the Ottoman Porte, and securing autonomy. And a return to local self-government, based on native ideas, was the prelude to material prosperity, as the recent history of Hungary, Wallachia, Greece, Servia, and Bulgaria proves.

Hungary, in the course of many centuries, developed a political and social constitution which has peculiar affinities to that of England. The most venerable of her institutions were the county assemblies with their lord-lieutenants, their exciting municipal and political elections, and their animated public discussions. When Hungary came under the sway of the House of Hapsburg, her ancient monarchical and representative institutions were preserved by the Pragmatic Sanction. But these were too liberal for the despotic ideas of the Austrian Government, and illegal attempts were made to undermine Hungarian independence, to destroy the county assemblies, and to sacrifice the national constitution in favour of the Viennese conception of "administrative unity" on the principle of absolutism. This it was that led to the revolt in 1848, while the aim of the patriots under Count Széchényi, Francis Deák, and Kossuth was to secure the consolidation of all classes of the community upon the basis of nationality and constitutionalism. And Hungary remained a thorn in the side of Austria, and a danger to the empire, until, under the guidance of Deák, the right of Hungary to govern itself according to its own ideas was at length conceded a score of years ago. Curiously enough, this very question of nationality is the rock ahead in Hungary. With the blindness by which too many dominant races are afflicted in questions with subject nationalities, —having secured their own independence, freedom, and native institutions,—the Magyars ignore the rights of the Slavs of Croatia and the Czecs of Bohemia to work out their own political salvation according to their race instincts and aspirations. There are, however, in Hungary some minds unwarped by the vice of national vanity and indolence of race; and the words of the "great Hungarian," Count Széchényi, uttered more than thirty years ago, deserve to be inscribed in letters of gold not only in the Diet Chamber at Buda-Pesth, but in the bureaus of every statesman: "To impose our language by force," exclaimed the Count, "is to provoke revolt; it is only our intellectual superiority that can

attach these races [the Croats, the Czecs, and the Serbs] to the Hungarian nationality. . . . How does a nation come to possess the force and virtue necessary for its political action? If the majority of the individuals composing it are to fulfil humanely and honourably their appointed task, they must acquire, above all, the art of pleasing, the faculty of attracting and absorbing the neighbouring elements. Is it likely that a people will possess this faculty who will not respect in others that which it insists on having respected in itself? It is a great art to know how to win men's hearts. Can they be said to possess it in the remotest degree who, when they have to deal with a generous adversary—passionately devoted like themselves to the traditions of his race—instead of according him chivalrous treatment, are always ready to fling mud at him.”¹

Again, a fertile source of dispeace and veiled insurrection in Russia, from the days of Peter the Great till the present time, has been the imposition, against the wishes of the great mass of the eighty-five millions constituting the nation, of institutions, laws, and political schemes of government imported from Germany and altogether foreign to the genius of the Slav people. “We are not,” said General Scobelev, “masters in our own household.” And the agitation born of the development of a peculiarly Slavonic political sentiment, with an impulse towards a special Slavonic civilisation, is only in the meantime kept in check by the variety of opinion as to the method by which the common end in view is to be attained. The national aspirations are, however, slowly ripening and assuming definite shape, and the most recent philosophic crystallization of the Slav “idea” is presented in a combination of the views of Samarin and Scobelev. This scheme proposes a federal union of all the Slav nationalities, in which union Russia will be the ruling spirit. Thereafter “the conduct and policy of the Government of Russia shall no longer be determined by the chance medley of events, or by the views of this or that individual,—be he even the autocrat himself,—but shall correspond with the requirements of the whole empire.” “This can only be done by the Government admitting the people themselves to council, and giving them, in one form or another, a voice in the affairs of State.” And the Council is to be founded on a system of public representation on democratic principles, starting—as its basis—with the *Mir* or peasant community, as the collective possessor of the undivided property of the commune.

But even under the present regime in Russia, wherever the slightest latitude is given for the free play of national life, contentment and prosperity reign. So far back as the sixteenth century overtures were made for an incorporating union between Russia and Poland, and, as Prosper Mérimée, the French historian, says, “although abortive, these attempts prove that, despite their ancient quarrels, the two great Slavonic peoples of the Middle Ages had a

¹ *La Bohême et la Hongrie*, by St. René Taillandier.

consciousness of their common origin, and that between the two nations there existed rather a rivalry than national hatred." The union attempted by peaceful methods nearly 300 years ago was later accomplished by less commendable tactics. Within recent years a certain measure of national government has been conceded to the Poles, and with the abandonment of political agitation a new era has dawned on the Grand Duchy of Warsaw. A writer in the *Journal de Genève*, himself a Pole, declares "that the country has now become the Belgium of Russia; and Warsaw, daily attaining to greater opulence, is now one of the most important cities in Europe. Nor is it Warsaw alone that flourishes. Everywhere throughout the ancient kingdom manufactures and industrial enterprise of all kinds multiply and thrive. Journalism, that sure index of popular intelligence, numbers, in the Grand Duchy, fourteen daily newspapers, four illustrated and three comic papers, to say nothing of eleven weekly and twenty-six monthly and bi-monthly reviews. And much as the Poles chafe against the Russian administration, there is no wish on their part to throw in their lot with either of their neighbours. Posen is eaten up with Germans. Galicia is perishing of an economic anæmia. *In Russian Poland alone the Poles preserve their nationality and prosperity.*"

Only a passing reference may be made to our great Eastern Empire. The most responsible and well-informed statesmen who have studied the facts, causes, and consequences of our rule in India agree that if ever the numerous and varied races of Hindostan are to attain a position in which they may be left to govern themselves, it must be through the gradual development of their civilisation and institutions from within outwards, and not by the imposition of a foreign civilisation and ideas. The greatest difficulties in India at the present day have arisen from well-meaning but mistaken attempts to transplant in the vast continent ideas and notions of government derived from western Europe, but which are altogether inconsistent with those of the teeming millions of the native races.

Nor do we lack confirmation of our theorem from the history of the British Colonial Empire. An ideal of local government—born of the freer atmosphere of the great American continent, fostered by the stern struggle for existence in which the pilgrims of the *Mayflower*, their descendants and followers, had to engage, broadened and deepened by the subtle influence of their boundless territory—was scornfully rejected by the short-sighted statesmen of Britain in the second half of last century. The attempt to repress the aspirations of the sturdy New Englanders and to impose the fossilized conceptions of colonial government of the home rulers of the Georgian epoch was successfully resisted; and the loss to Britain of the colonies of the United States of America was a gain to the world in the birth of a great and progressive nation. The problem has had, in one sense, a happier solution in Canada.

In a recent lecture, delivered in Edinburgh, the Hon. Sir Alexander Tilloch Galt, G.C.M.G., High Commissioner for the Canadian Dominion, referring to this very subject, said: "The Province of Quebec, in Lower Canada, was a conquered country, inhabited by a foreign race, speaking a foreign language, and having laws of their own. They were kept under by a small English minority. They were given a constitution about ninety years ago. Under that constitution they endeavoured to obtain the control of their own affairs, but they found themselves constantly checked by the superior power of the governing race. The result was a rebellion, which was, of course, put down; and then the remedy which was applied was to unite the Province of Lower Canada, now the Province of Quebec, with the English Province of Ontario. The result of that union for a few years was as satisfactory as could be desired, but presently the English province grew so rapidly in population and in wealth, that the time arrived when the French province began to be again alarmed in regard to their language, their institutions, and their laws. They arrived at a dead-lock. They could not work their system, and they then found their remedy—not by giving self-government only to Quebec, but by extending the principle of federation to the other provinces of North America, by bringing in new blood and new ideas. And the consequence has been that peace, tranquillity, and progress has signalized the whole state of Canada since the Confederation became law."

But we find illustrations nearer home of the existence of race ideals, and of the necessity of taking account of these in the construction of positive laws. Ireland and the Irish have been ruled for more than three centuries by England. During these centuries England has attempted to impose on Ireland her system of government, her institutions, her laws,—her "idea," in fact. But with what result? "The law was a monster of oppression; its aim was to crush alike the religion, the trade, and the civil life of the people,—to prevent their education, to sow discord in families, and to divorce from the soil all the native Irish." In the train of all this followed woeful and persistent disaffection, discontent amounting at times to anarchy; while the realization of the English "idea" in Ireland is as far as ever from accomplishment. Ireland never will be peaceful or loyal to England unless permitted to develop her own political and social life according to the national "idea," which ethnological facts seem to point as being based on a peasant proprietary and a quickened municipal life.

Look again at our own Scotland. England here also endeavoured unceasingly, for at least a couple of centuries, to impose on this country (leaving out of sight the Highlands, which, until literally denuded of their Keltic inhabitants, occupied much the same position towards the Lowlands and England as Ireland did to England) the English idea of law, custom, church organization, etc.

So long as these attempts were persisted in, so long was there rebellion, war, oppression. The material condition of the country deteriorated, and in the end of the seventeenth and beginning of the eighteenth centuries the Scotch were poorer and nearer to barbarism than in the fourteenth and fifteenth. On the dawn of a better day, Scotland by an honourable union obtained safeguards for the development of her own national life, the retention and improvement of her own laws and customs, the pursuit of her own educational aims, the organization of her own ecclesiastical arrangements,—in short, secured the realization of her own national idea. The result is notorious. Material prosperity advanced by leaps and bounds, population increased, laws were improved, and now Scotland is the most peaceable, contented, and loyal country in the whole British Empire, and, for its size, the wealthiest in the world.

In conclusion, we submit that we have established the existence of a specialized political sentiment in every race, that it is the result of necessary and, as such, unchangeable laws. It is the province of the science of Political Ethnology to discover what the true ideals of the races of mankind are, and the duty of the politician, the legislator, and the jurist to give effect to these ideals in shaping laws and political institutions. It is on these principles that we argue for the full maintenance of our Scottish system of jurisprudence and the administration of justice; that we maintain the peculiar laws of Scotland ought to be in full accord with Scottish ideas and untampered with by English judges. We contend that the aspirations of the Irish must be appreciated; that the wants of the country and the defects in its laws must be legislated for, not in accordance with English or Scotch ideas, but on the lines of the genius of its people; and that in proportion as this scheme of legal redress of undoubted wrongs is ignored, there will be dispeace and an ever-abiding sense of injustice and oppression, which the most disinterested and magnanimous efforts of statesmen, guided by opposite rules, will utterly fail to wipe out.

W. KINNAIRD ROSE.

FOURTEENTH REPORT OF THE JUDICIAL STATISTICS OF SCOTLAND FOR 1881.

CRIMINAL STATISTICS OF COUNTIES AND BURGHS.

(Continued from vol. xxvii. p. 75.)

DEBTS RECOVERY PROCEDURE.

THE report proceeds to the Sheriff "*Debts Recovery Courts.*" This does *not* form a *separate* Court of the Sheriff, but merely a novel form of procedure. It is by a recent Act engrafted on the old form. It forms a sort of debateable land between the Sheriff's Ordinary Court and his Small Debt Court, mingling the

forms of both Courts. It reverses the usual process by first recording the *defender's* pleas or defences, followed by the pursuer's pleas or claims, without any provision for a reply. There may be no record of evidence, and nevertheless there is an appeal from the Substitute to the principal Sheriff. There is the strange average or communistic scale of fees to the solicitors where the small and unimportant cases are overpaid, so as to remunerate for those of larger amount and greater labour—a principle by no means commendable or encouraging either to the legal profession or the clients.

The first table under this department is one comparative of the business for five years, from 1877 to 1881, both years inclusive. This elaborate table gives the following particulars:—

	1877.	1878.	1879.	1880.	1881.
I. Number of cases within the year—					
1. Causes in dependence at commencement	289	288	229	194	201
2. Primary enrolments within the year	5372	6461	6311	5718	5256
3. Causes in which no proceedings in previous years, but revived by re-enrolment	2	...	...	6	12
<i>Note.</i> —This last to many is perfectly unintelligible.					
Total	5663	6744	6540	5918	5469

II. Disposal of causes—					
1. By decree	3962	4774	4758	4227	3883
2. Otherwise than by decree	1326	1667	1538	1455	1339
3. Causes in which no proceedings within the year taken off the roll	92	74	49	35	42
4. Causes in dependence at the end of the year	283	229	195	201	205
Total the same as above.					

III. Nature of decrees—					
1. In absence	2502	2975	2962	2752	2438
2. <i>In foro</i>	1460	1799	1796	1475	1400
Total	3962	4774	4758	4227	3888

Note.—It will be noticed how few claims have been resisted. The remedy might have been better obtained had the Small Debt jurisdiction been extended to £50, but with power to the Court, on the defender's motion, on good cause shown, to remit to the Ordinary Court.

IV. Result of decrees—					
1. For pursuers in absence	2310	2757	2735	2498	2228
2. For defenders in absence	92	104	116	115	120
3. Otherwise in absence (?)	100	114	111	139	135
4. For pursuers <i>in foro</i>	786	1050	1041	821	736
5. For defenders <i>in foro</i>	265	304	323	252	258
6. Otherwise <i>in foro</i> (?)	409	445	432	402	406
Total the same as No. III.					

Note.—These results confirm the observation made in the last note.

V. Reponings—					
1. At pursuer's instance	35	27	29	27	18
2. At defender's instance	124	91	107	53	46

VI. Analyses of primary decrees <i>in foro</i> —					
1. By Sheriff	89	142	119	98	78
2. By Sheriff-Substitutes	1371	1657	1677	1377	1322

	1877.	1878.	1879.	1880.	1881.
VII. Appeals to Sheriff-Depute (?)—					
1. In dependence at commencement of year	26	17	19	19	16
2. Entered by notice within the year (?)	239	225	262	176	202
VIII. Disposal of Appeals to Sheriff-Depute—					
1. Affirmed	166	162	195	135	172
2. Altered	75	55	60	42	21
3. Withdrawn	7	8	7	2	5
4. In dependence at end of the year	17	19	19	16	20
IX. Appeals to Court of Session—					
Number of	4	4	8	2	4

Note.—The result of appeals to the Court of Session would have been gratifying to have been here stated.

X. Cases conducted by agents—

1. For pursuers	2129	2515	2582	2191	2171
2. For defenders	171	207	219	158	156
3. For both pursuers and defenders	982	1146	1104	951	1027

Note.—Some regulation ought to be made both in this and the Small Debt Court requiring notice to be given where agency is to be employed on either side.

XI. Debts claimed in causes decided by decree—

1. In causes decided by decrees in absence	£54,699	£66,633	£63,217	£57,494	£52,181
2. In causes <i>in foro</i>	32,135	39,860	40,582	33,606	32,141
Total	£86,835	£106,184	£103,799	£91,101	£84,322

Note.—Parts of pounds are given in the report, but are omitted in this abstract. These results show how largely recourse is had to this department. It is unfortunate that the amounts of claims are not given in the Sheriff's Ordinary Court; but there are causes in that Court of interdict, removings, and *ad factum præstandum*, the value of which could not well be ascertained.

XII. Disposal of debts claimed—

1. Amount decerned for	£74,920	£92,904	£89,373	£79,051	£71,561
2. Amount claimed but not decerned for	11,914	13,279	14,426	12,049	12,761

Total the same as in No. XI.

XIII. Analyses of debts decerned for—

1. In <i>decrees</i> allowing full claims	£66,493	£83,282	£80,483	£70,758	£62,958
2. Allowing partial claim	8,204	9,516	8,875	8,270	8,492
3. Otherwise (?)	222	105	16	22	110

XIV. Analyses of debts claimed but not decerned for—

1. In decrees disallowing the whole	7,961	9,273	10,224	8,118	8,546
2. In decrees disallowing a part	3,953	4,006	4,201	3,930	4,215

XV. Analyses of decrees allowing full claims—

1. By decree in absence	50,093	62,377	58,998	52,664	46,792
2. By decree <i>in foro</i>	16,394	20,904	21,484	18,094	16,165

XVI. Analyses of decrees disallowing the whole—

1. By decree in absence	1,903	2,168	2,487	2,239	2,522
2. By decree <i>in foro</i>	6,052	7,105	7,737	5,879	6,023

	1877.	1878.	1879.	1880.	1881.
XVII. Amount carried by reversals or alterations on appeal to Sheriff—					
1. In favour of pursuers .	£398	£286	£278	£152	£174
2. In favour of defenders .	324	324	306	267	209
XVIII. Total fees received . . .	1,018	1,218	1,134	1,034	981
XIX. Costs during the year—					
1. In favour of pursuers .	3,629	4,355	4,401	3,678	3,479
2. In favour of defenders .	460	430	418	342	411
3. Otherwise (?) . . .	13	14	4	9	25

It is difficult to imagine what possible practical benefit can be derived from several of the articles in this long and minute table, but certainly there can be no question but that very great trouble has been imposed on Sheriff-Clerks in obtaining the materials, and it may greatly be doubted if they are really accurate.

A table distributes the *general* minute results among thirty-four Courts. We extract only the various Courts which had at least *one hundred* causes in the "Debts Recovery" department, and the value of these claims:—

	Causes.	Values.
Glasgow had	1,310	£20,152
Edinburgh	569	8,400
Dundee	327	5,045
Paialey	263	4,637
Hamilton	202	2,933
Perth	197	1,834
Aberdeen	196	3,048
Airdrie	147	2,166
Greenock	136	2,121
Inverness	135	1,960
Forfar	110	1,609
Stirling	103	1,683
Kilmarnock	102	1,263
Dumfries	102	1,744
Ayr	100	1,353

Some Courts had very few cases, and several appear under Sheriffs' Small-Debt Circuits, of which there may arise some doubts of their competency to be heard in these Courts.

Three additional tables are given, distributing all the very minute details given in the *general* table of the "Debts Recovery" department amongst the various Courts. These details are of so little practical avail that they may not there be noticed. It appears that in Glasgow 79 appeals in debts recovery causes were taken to the Sheriff-Principal, whereof 59 were affirmed and 11 reversed, in 9 otherwise disposed of. In Edinburgh, only 7 appeals were taken, of which 6 were affirmed and 1 reversed. In many Courts no appeals were taken within the year 1881. Under the unintelligible heading of "Number of causes in which no proceedings during the previous year, but *revived* by re-enrolment within the year," only *one* Court (Edinburgh) gives any response, and that to the amount only of 12 causes.

SHERIFF SMALL-DEBT COURTS.

The report proceeds with the Sheriff Small-Debt Courts. The first table is as usual "retrospective," being a "comparative table of the business in these Courts in the years 1877 to 1881 inclusive."

	1877.	1878.	1879.	1880.	1881.
I. Number of causes before the Court within the year—					
1. Causes in dependence at commencement of the year	1,128	1,171	1,158	1,215	1,206
2. Primary enrolments within the year	49,622	56,148	57,335	59,999	54,934
3. Brought during the year from Ordinary Court under section IV.	23	17	22	27	21
4. In which no proceedings in previous year, but revived by re-enrolment(?).	5	...	1	16	2
Total	50,778	57,336	58,516	61,257	56,163
II. Disposal of causes—					
1. By decree	40,582	45,731	47,112	48,715	43,343
2. Otherwise than by decree (?)	8,512	9,845	9,445	10,610	10,950
3. Causes in which no proceeding within the year taken off the roll	563	602	742	727	758
4. Causes in dependence at the end of the year	1,171	1,158	1,217	1,205	1,112
Total	50,778	57,336	58,516	61,257	56,163
III. Nature of decrees—					
1. In absence	29,123	33,700	35,318	36,622	32,283
2. <i>In foro</i>	11,404	12,031	11,794	12,093	11,060
Total	40,582	45,731	47,112	48,715	43,343
IV. Result of decrees—					
1. For pursuers in absence	25,310	29,660	31,101	32,463	28,143
2. For defenders in absence	2,663	2,937	2,928	2,744	2,503
3. Otherwise in absence (?)	1,155	1,103	1,289	1,415	1,637
4. For pursuers <i>in foro</i>	6,301	6,558	6,696	6,493	6,044
5. For defenders <i>in foro</i>	2,479	2,710	2,418	2,599	2,417
6. Otherwise <i>in foro</i> (?)	2,624	2,763	2,680	3,001	2,599
Total the same as in the last section.					
V. Reponings on decrees in absence.					
On decrees in previous year—					
1. At defender's instance whereof reversed.					
2. At pursuer's instance whereof in his favour (?).					
On decrees within the year—					
1. At defender's instance whereof reversed (?).					
2. At pursuer's instance whereof in his favour (?).					
<i>Note.</i> —The results in these cases are of no practical use, and therefore are here omitted.					
VI. Cases conducted by agents—					
For pursuers	7,592	9,290	11,079	11,670	10,375
For defenders	1,154	1,476	1,330	1,409	1,196
For both pursuer and defender	2,813	3,002	3,193	3,280	3,160
VII. Debts claimed in causes decided by decree—					
1. In causes decided by decree in absence	£121,948	£146,378	£153,606	£152,564	£134,878
2. By decree <i>in foro</i>	56,148	59,609	58,554	58,412	53,108
Total	£178,096	£205,988	£212,160	£210,976	£187,986

	1877.	1878.	1879.	1880.	1881.
VIII. Nature of <i>claims</i> decided by decree—					
1. Debts . . .	£148,782	£171,788	£171,866	£171,048	£150,630
2. Damages . . .	7,460	8,081	6,241	5,887	5,633
3. Sequestrations for rent	18,789	22,496	30,103	29,593	26,771
4. Not included in the above(?) . . .	3,064	31,621	31,949	4,447	4,951
Total . . .	£178,096	£205,988	£212,160	£210,976	£187,986

IX. Disposal of *debts* (?) claimed—

1. Amount decerned for.
2. Amount claimed but not decerned for.

Note.—This division is of little or no practical use. The total is the same as in VII. and VIII.

X. Analysis of *debts* (?) decerned for—

1. In decrees allowing full *claims*.
2. In decrees allowing *partial claims*.
3. Otherwise (?).

Note.—This section is of no public or practical use except to the parties, and therefore is here omitted. The total agrees with no other summation in the table, which is not easily accounted for, and shows how unnecessary this section is.

XI. Analysis of *debts* (?) claimed but not decerned for—

1. For *decrees disallowing the whole*.
2. For „ „ *part*.

Note.—Here again the last note may be repeated. The sum total agrees with no other summation.

XII. Analysis of decrees *allowing full claim*—

1. By decrees in absence.
2. By decrees *in foro*.

Note.—The same remark is repeated, and the analysis omitted.

XIII. Analysis of decrees *disallowing the whole*—

1. By decrees in absence.
2. By decrees *in foro*.

Note.—The note is once more repeated. It is not easy to perceive how any claim can be disallowed *in absence* of parties.

XIV. Total fees received . . . £6,878 £7,589 £7,691 £7,832 £7,186

XV. Costs awarded during the year—

1. In favour of pursuers . . .	10,476	12,036	13,214	13,030	11,846
2. In favour of defenders . . .	551	618	486	523	466
3. Otherwise (?) . . .	2	2	2	5	2

Total . . . £11,030 £12,657 £13,704 £13,558 £12,315

Several tables follow distributing the general table among the 112 County Courts and Sheriff Small-Debt Districts, with all their excessive details. We take all the Courts having 800 cases and upwards during the year 1881:—

Glasgow	16,687, involving sums of £62,831
Edinburgh	4,313, „ „ 16,870
Paisley	2,662, „ „ 8,973
Aberdeen	2,620, „ „ 6,903
Dundee	2,241, „ „ 7,854
Greenock	2,143, „ „ 5,554
Hamilton	1,838, „ „ 5,470
Airdrie	1,539, „ „ 4,223
Dumbarton	1,316, „ „ 3,316
Perth	994, „ „ 3,857
Inverness	955, „ „ 3,256

Kilmarnock	950, involving sums of	£2,594
Falkirk	874, „ „	2,751
Ayr	832, „ „	2,453
Peterhead	820, „ „	2,425

Several of the Courts have tried less than 800 cases during the year 1881. Fifty-one Courts had less than 100, some had less than 20, two had only one case, and five District Courts had no case in the year 1881. In these circumstances it could be of no practical benefit to be informed as to how cases were particularly disposed of—how much of the claim was allowed, how much disallowed, and such-like minute details.

The report proceeds with the “Justice of Peace Small-Debt Courts.” As with the other Courts, it commences with a “retrospective table,” being a *comparative* table of the business done in these Courts in the years 1877 and 1881 inclusive.”

	1877.	1878.	1879.	1880.	1881.
I. Number of causes before the Court within the year—					
1. Causes in dependence at commencement of the year	82	84	95	89	67
2. Primary enrolments within the year	15,988	15,615	13,946	15,881	14,795
3. Causes in which no proceedings in previous year, but revived by re-enrolment (?) . . . . .	...	18	...	1	—
Total	16,070	15,717	14,041	15,971	14,862
II. Disposal of Causes—					
1. By decree	14,526	14,181	12,332	14,257	13,320
2. Otherwise than by decree (?)	14,056	1,434	1,621	1,650	1,464
3. Causes in which no proceedings within the year <i>taken off the roll</i>	4	7	...	...	3
4. Causes in dependence at the end of the year	84	95	88	64	75
Total	16,070	15,717	14,041	15,971	14,862
III. Nature of decrees—					
1. In absence	10,817	10,649	9,095	10,655	10,071
2. In <i>foro</i>	3,709	3,532	3,237	3,602	3,249
Total	14,526	14,181	12,332	14,257	13,320
IV. Result of decrees—					
1. For pursuers in absence	10,182	9,831	8,624	9,944	9,680
2. For defenders in absence	263	254	193	138	139
3. Otherwise than for pursuer or defender <i>in absence</i> (?)	372	564	278	573	252
4. For pursuers <i>in foro</i>	2,561	2,828	2,175	2,387	2,221
5. For defenders <i>in foro</i>	455	450	371	478	357
6. Otherwise than for pursuer or defender <i>in foro</i> (?)	693	754	691	737	671
Total	14,526	14,181	12,332	14,257	13,320
V. Causes conducted by agents—					
1. For pursuers	188	166	271	253	291
2. For defenders	139	101	65	120	130
3. For both pursuer and defender	55	13	14	40	15

	1877.	1878.	1879.	1880.	1881.
VI. Total claimed by causes decided by decree—					
1. In causes decided by decree in absence	£21,741	£20,900	£18,257	£20,409	£19,450
2. In causes decided by decree in foro	7,149	7,633	6,695	6,981	5,763
Total	£28,890	£28,533	£24,953	£27,390	£25,213
VII. Nature of claims decided by decree—					
1. Debts	£28,078	£27,778	£24,163	£26,552	£24,461
2. Damages,	875	265	195	272	233
3. Not included in the above (?)	436	488	593	565	518
Total same as in No. VI.					
VIII. Disposal of amount of debts claimed—					
1. Amount decerned for.					
2. Amount claimed but not decerned for.					
IX. Analysis of debts decerned for—					
1. In decrees allowing full claims.					
2. In decrees allowing partial claims.					
3. Otherwise (?).					
X. Analysis of debts claimed but not decerned for—					
1. In decrees disallowing the whole.					
2. In decrees disallowing part.					
XI. Analysis of decrees allowing full claims—					
1. By decrees in absence.					
2. By decrees in foro.					
XII. Analysis of decrees disallowing the whole—					
1. By decrees in absence.					
2. By decrees in foro.					
<i>Note.</i> —To ascertain materials to answer Numbers VIII. and XII. inclusive must have cost much trouble and toil, and it is very doubtful if they can be accurately ascertained from the Judicial Records, and though they could are of no possible benefit.					
XIII. Total fees received,	£1,492	£1,456	£1,298	£1,524	£1,570
XIV. Costs awarded during the year—					
1. In favour of pursuers	2,004	1,936	1,637	2,132	1,638
2. In favour of defenders	1	8	2	1	1
3. Otherwise (?) . . . . .	...	...	...	...	...
Total	£2,005	£1,944	£1,639	£2,134	£1,639
XV. Total sales under poindings	53	45	71	67	86
1. Principal sums in decrees	£119	£125	£135	£180	£213
2. Total expenses in decrees	9	7	12	11	13
3. Free proceeds of sale	114	111	101	146	192
4. Total expenses of poindings and sales	37	38	57	49	69
5. Total surplus paid to debtors	3	4	6	2	5

Note.—This last division embraces matters of grave consideration. It first will be observed how small is the number of decrees put into execution by the only available mode and the small amount of free proceeds of sales. The general feeling is not to send good money in quest of bad. There are some cases where the displenishing of a debtor's dwelling has only increased the amount of the creditor's claims.

The District Small-Debt Courts when instituted in 1838 were eagerly made use of. Since then railway communication has been so greatly extended, the limitation of arrestment of wages and other circumstances have almost entirely introduced dealing for

cash in place of credit. The age of "pass books," so frequently the cause of disputes, has passed away. Some District Courts, which years ago had 50 and 100 cases on their roll, have now perhaps only 10, and several have none. So, with the exception of large towns, these Circuit Courts might well be abolished.

The same order as was adopted with the Sheriff Small Debt Courts is followed with the Small Debt Courts of the Justices. A table is prepared which distributes the very minute particulars detailed in the general table formerly given among the 34 counties and 98 districts where Justice of Peace Courts were appointed to be held. Here it is shown that in some counties no such Courts have been held, such as Aberdeen, Berwick, Bute, Clackmannan, Cromarty, Dumbarton, Elgin, Fife, Haddington, Kincardine, Kinross, Kirkcudbright, Linlithgow, Nairn, Orkney, Peebles, Perth, Roxburgh, Selkirk, Sutherland, and Zetland. In all these counties the Justice of Peace Small-Debt Courts, which in times not long remote were the only tribunals for trifling matters, are now defunct, and the Justice of Peace, so far, may say, "Othello's occupation's gone." Like the kine in the dream of the patriarch, the Sheriff Small-Debt Courts have in time entirely swallowed their predecessors, and left nothing but skeletons to mark where once life and substance existed. In some large counties one or two district Courts remain as relics of antiquity. Of the 98 district Courts which once existed, only 34 show any symptoms of life during the year 1881, and of these nine had less than 20 cases, and three Courts had only each one case to require the judgment of the quorum. One of these unfortunate units appeared to have been disposed of "otherwise than by decree," and another was left "in dependence at the end of the year!" Edinburgh had £4393 in value of causes before the Court, and County of City of Edinburgh £4559. In Lanarkshire, Airdrie had of claims £1765, Hamilton £2480, and Glasgow had £7615. Greenock is the only other town or district that had claims upwards of £1000 to adjudicate, having £1057; nineteen Courts had less than £100, and one Court assembled to give a decree in absence on a claim for 7s. 2d. ! The whole amount of debts and damages brought before these Courts in 1881 was £25,213, 17s. 6d. Decrees passed in absence for no less than £19,450, 2s. 9d. of that aggregate sum. Only in seven Courts have its decrees been enforced by poindings, and the number in all in 1881 was 86. The total sum in the decrees, including expenses, was £227, 1s. 7d. The expenses of poinding and sale were £69, 6s. 1d.; the free proceeds of sales were £192, 19s. 1d., leaving a surplus in four Courts to be paid to unfortunate debtors of £5, 7s. 5d. It would be preposterous to analyze the general table and distribute the various most unnecessary details appearing in the general table among the various Courts, which can be of no importance to any one.

JUDICIAL RECORDS.

The report concludes with a department called "*Judicial Records.*" But the first section, devoted to "*Bankruptcy,*" will be found to be much more than mere records. It commences with "retrospective tables," or comparative tables, for the years ended 31st October 1876-1880 inclusive. The facts and figures here given are of vast importance to the commercial and mercantile community. These must have been collected and tabulated at much trouble and cost, and it is to be hoped, but it may be doubted, if the results can have been accurately ascertained:—

I. Number of bankruptcies (sequestrations ?)—

	1876.	1877.	1878.	1879.	1880.
1. In dependence at commencement of the year . . .	2731	2796	2883	3084	3672
2. Awarded during the year . . .	482	543	717	1072	582
3. Re-opened during the year (?) . . .	2	4	3	5	1
Total	3215	3343	3598	4161	4255

Note.—Several notes are appended referring to various preceding annual reports, but as these are not always at hand, it would be well, if the references are of importance, they should be repeated, otherwise an erroneous conclusion may be drawn.

II. Disposal of bankruptcies (sequestrations ?)—

1. Recalled	3	4	2	4	6
2. Wound up by final division and discharge	279	339	293	254	382
3. Wound up by composition	92	97	108	165	150
4. Wound up by deed of arrangement	8	13	21	24	21
5. Otherwise wound up (?)	34	45	41	38	64
6. In dependence at the end of the year	2799	2845	3088	3676	3632

Total same as in Section I.

III. Time between awarding and discharge of bankruptcies wound up by final division—

6 months and under 1 year	17	23	30	18	44
1 year and under 18 months	50	59	50	62	113
18 months and under 2 years	46	60	44	46	73
2 years and under 3 years	61	60	58	62	80
3 years and under 4 years	30	34	26	22	26
4 years and under 5 years	21	19	21	17	9
5 years and upwards	54	85	64	27	32
Total	279	340	293	254	382

IV. Bankruptcies (sequestrations ?) awarded during the year—

1. By Court of Session and remitted to Sheriffs	83	99	103	161	87
2. By Sheriffs of counties	399	444	614	911	495

Total the same as No. 2 in Section I.

V. Number of bankruptcies (sequestrations ?) during the year—

1. For sole sequestrations	433	499	628	975	549
2. For joint or partnership sequestrations	106	88	189	209	71
Total	539	587	817	1184	620

	1876.	1877.	1878.	1879.	1880.
This total disagrees with sub-section 2 in No. I.					
1. Traders	404	431	622	857	420
2. Manufacturers	72	54	74	106	40
3. Farmers	17	27	44	113	93
4. Lawyers	4	3	8	23	8
5. Medical practitioners	3	4	0	7	0
6. Clergymen	1	0	0	3	1
7. Persons not acquiring income by any occupation	12	14	23	21	29
8. Not included in the foregoing (?)	26	54	46	54	29
Total	539	587	817	1184	620

VI. Bankruptcies (sequestrations concluded by final division and discharge)—

1. Gross estate per inventory and valuation by trustees	£1,112,632	£724,803	£748,468	£591,250	£601,959
2. Debts of all kinds as ascertained by trustees	2,269,042	1,666,298	1,614,062	1,163,935	1,243,359
3. Sums recovered by trustees during the sequestration	964,673	692,664	606,663	416,264	490,248
4. Disposal whereof by trustees, thus—Expenses.					
(1) Allowance to bankrupts	£1,027	£2,362	£1,117	£7,246	£942
(2) Trustees' commission	29,765	30,028	26,422	21,479	20,739
(3) Law expenses	35,839	36,664	29,967	23,914	28,080
(4) Miscellaneous ordinary expenses	12,951	14,753	11,832	10,926	12,632
(5) Miscellaneous extraordinary expenses	37,201	96,327	44,563	25,541	17,645
Total expenses	£116,785	£180,136	£113,903	£89,109	£80,042

Note.—The difference between the allowance to bankrupts between 1880 and previous years is remarkable.

Dividends.

(6) To secured or preferable creditors	£422,273	£194,583	£150,678	£126,630	£222,041
(7) To unsecured or ordinary creditors	423,431	313,881	341,786	199,945	137,155

Total dividends	£845,704	£508,464	£492,465	£326,575	£409,197
(8) Less over-payments by trustees . . . . .	...	...	...	...	...
(9) Add <i>surplus paid</i> to bankrupts or their representatives, less over-payments made by trustees in certain sequestrations	£2,183	£4,063	£294	£579	£1,009
Total expenses and dividends the same as in No. VI.					

Note.—No. 8 appears to have been unnecessary, as it has had no results, and yet it appears somewhat inconsistent with No. 9, where surplus payments are assumed.

	1876.	1877.	1878.	1879.	1880.
VII. Classification of the bankruptcies (sequestrations?) concluded by final division and discharge according to the value of the estates realized—					
Estates under £100	29	39	39	23	59
Of £100 and under £500	136	141	132	113	171
„ £500 „ £1,000	34	58	42	45	61
„ £1,000 „ £5,000	62	76	56	48	74
„ £5,000 „ £10,000	12	13	10	15	12
„ £10,000 „ £50,000	4	12	13	10	4
„ £50,000 „ £100,000	0	1	1	0	1
Above £100,000	2	0	0	0	0
Total same as No. 3.					

VIII. Rates of dividend per £1 upon the unsecured debts in bankruptcy (sequestrations?) concluded—					
No dividend	35	36	35	23	45
Not exceeding 1s.	35	51	50	42	71
Exceeding 1s. and not exceeding 2s. 6d.	57	65	52	49	97
Exceeding 2s. 6d. and not exceeding 5s.	71	80	76	69	88
Exceeding 5s. and not exceeding 10s.	54	77	56	49	54
Exceeding 10s. and not exceeding 15s.	18	17	14	13	16
Exceeding 15s. and not exceeding 20s.	4	4	5	3	8
At 20s.	5	10	5	6	3
Total same as under Nos. III. and VII.					

JUDICIAL FACTORIES.

The report proceeds with Judicial Factories:—

	1876.	1877.	1878.	1879.	1880.
I. The total number of bonds standing over from previous years, and also lodged with the accountant within the year, separately stated, were	965	966	1,017	1,037	1,039
II. Disposal of bonds—					
1. Wound-up or re-called	95	83	99	128	112
2. Remaining at the end of the year	870	883	918	909	927
III. The nature of appointments—					
1. Factors <i>loco tutoris</i> .					
2. Factors <i>loco absentia</i> .					
3. Curators <i>bonis</i> .					
(Unnecessary here to specify, but given in the report.)					
IV. State of accounts—					
1. Accounts rendered within the year	857	858	883	897	906
2. Accounts not rendered as not due before the end of the year	106	107	132	140	130
3. Accounts due, but not rendered within the year	2	1	2	...	3
(The total the same as in No. 1.)					

V. Amount of funds—

1. Personal estate—

	1876.	1877.	1878.	1879.	1880.
	£2,390,907	£2,569,908	£2,699,567	£2,503,589	£2,516,989
2. Lands and heritages (value not ascertained).					

VI. Revenue of estates from—

	1876.	1877.	1878.	1879.	1880.
1. Funds . . .	£81,912	£93,960	£94,033	£90,794	£89,852
2. Annuities, Pensions, etc. . .	24,284	19,056	21,776	24,379	20,451
3. Heritages . . .	97,075	139,280	128,216	114,170	105,498
Total revenue	£203,272	£252,297	£244,026	£229,344	£215,802

VII. Expenditure for—

1. Maintenance of wards . . .	£85,183	£89,785	£94,231	£84,001	£92,357
2. Factors' commission . . .	14,761	14,842	14,110	12,594	12,268
3. Accountants' charges . . .	1,567	1,526	1,523	1,126	1,290
4. Law agents' charges . . .	6,630	7,775	6,242	6,335	7,421
Total expenditure	£108,143	£113,929	£116,107	£104,058	£113,337

The next department is "Judicial Records kept at Edinburgh." Here the years are from 1877 to 1881 inclusive (the former tables ended on 31st October, the following are carried down to the complete year):—

	1877.	1878.	1879.	1880.	1881.
I. Register of deeds—					
i. Entries in presentment-book—					
1. Original writs	3247	3528	4143	3645	3909
2. Second extracts of writs previously recorded	280	312	373	313	329
Total	3527	3840	4516	3958	4238
ii. Total fees, etc. received	£3876	£4124	£4513	£4229	£4344
II. Register of protests on bills and notes—					
Total number of protests	481	703	651	442	379
Total number of persons protested against	617	910	945	552	475
Total sums protested for	£36,155	£87,125	£71,368	£35,527	£24,896
III. Certificates entered in the Register for English and Irish judgments—					
From England	41	43	32	37	45
From Ireland,	2	2	2	4	2
Total	43	45	34	41	47
IV. Register of Adjudications—					
Total entries in presentment-book for the year—					
1. Mercantile sequestrations	542	721	987	533	427
2. For recovery of specified debts . . . . .	...	2	1	...	7
3. For other purposes	202	208	293	351	319
Total	744	931	1281	884	753
Total of specified debts, . . . . .	...	£183	£812	...	£3972
Total fees received during the year	£59	£74	£89	£74	£65

	1876.	1877.	1878.	1879.	1880.
V. Register of Inhibitions—					
Total entries in presentment-book during the year—					
1. Mercantile sequestrations .	568	819	982	559	448
2. For recovery of specified debts	190	289	216	201	173
3. For other purposes	489	600	680	651	554
Total	1247	1708	1878	1411	1175
Total fees received during the year	£191	£263	£242	£205	£167
VI. Register of Hornings—					
Total entries in presentment-book during the year	235	289	316	254	24
Total fees received during the year	£38	£47	£56	£43	£5
VII. Bill Chamber business—					
1. Suspensions, interdicts, and liberations	225	234	211	184	114
2. Bills for loosing arrestments	11	5	3	3	3
3. Petitions for sequestration under Bankrupt Act	105	112	171	110	104
4. Other petitions	112	116	139	80	93
Total	453	467	524	377	314
VIII. Register of Sasines—					
Total entries in presentment-book for the year	33,966	31,988	31,809	30,275	29,461
Total fees for the year	£31,304	£28,921	£28,484	£26,774	£25,753
IX. Registered protests on bills and notes—					
I. Number of protests—					
In District Registers	2,276	2,904	2,973	2,183	1,864
In General Register	481	703	651	442	379
Total	2,757	3,607	3,624	2,625	2,243
II. Persons protested against—					
In District Registers	2,575	3,417	3,518	2,626	2,209
In General Register	617	910	945	552	475
Total	3,192	4,327	4,463	3,178	2,684
III. Sums protested for—					
In District Registers	£91,796	£133,983	£124,438	£76,649	£60,853
In General Register	36,155	87,125	71,368	35,527	24,896
Total	£127,952	£221,108	£195,806	£112,177	£85,749

Note.—In all these tables parts of pounds are given, however unnecessary, and a column is added giving a quinquennial average, which appears of no possible use.

The report returns to what has already been given in prior retrospective tables, and gives a return for the year ended 31st October 1880. It gives under the head of "Bankruptcy" 3632 sequestrations in dependence at that date, and 623 as "wound-up and disposed of within the year." A repetition of all the minutiae of the results of sequestrations for 1880 is again given, the reason for which is not apparent, especially as great discrepancies appear between this table and the previous tables which are not explained.

A table is given of the Returns of Keepers of Register of

Sasines "for the year ended 31st December 1881." The total number of entries in presentment-book is 29,461. The total fees received were £25,753. In Edinburgh the number was 6650, and the fees £5974. Glasgow had 3189, and received in fees £3873. Ayr is the only other county that had more than 2000 entries, having had 2030, and drew in fees £1467.

The only other table in the report contains "Registered Protests on Bills and Notes for the year 1881." As already reported in a previous table, these amounted to 2243, and the persons protested *against* (?) were 2684, and the total sums *protested for* £85,479. The General Register kept at Edinburgh had 379 protests, with 475 persons protested against, and £24,896 of sums. Of particular registers, Glasgow had the largest number, being 354, persons protested against 401, and sums £13,677; Aberdeen had 225 protests, 275 persons, and sums £7662; Edinburgh special register had 133 protests, 157 persons, and sums £2878. All the other counties had less than 100 protests, some had very few, and three had none; whilst Cromarty had only one bill protested, the value being £6, 17s. 6d.

We have abridged this voluminous report, so interesting to the general public. We venture to express the opinion that, without decreasing its interest, in future it could be made much more useful by confining its details to such results as are really important. Many of the figures which bristle throughout the volume are of no significance, but must have cost a vast amount of labour, and still more cost in collecting and tabulating. After all this, it may be much doubted if all of them can be verified by actual investigation, and therefore they may lead to very erroneous conclusions. The report, however, reflects the greatest praise on Mr. William Donaldson, the indefatigable secretary to the Prison Commissioners, whose labours have again sent forth another report, every page of which shows his industry in this rather uninviting sphere of statistics.

NESTOR.

Reviews.

Imperatoris Justiniani Institutionum libri quattuor; with Introductions, Commentary, Excursus, and Translation. By J. B. MOYLE, B.C.L., M.A., of Lincoln's Inn, Barrister-at-Law, and Fellow and Tutor of New College, Oxford. 2 Vols. Oxford, 1883.

THE Delegates of the Clarendon Press have just issued these two very handsome octavos. In matter and form they are in every way worthy of the reputation that previous Clarendon publications have earned.

The first volume opens with a general introduction, extending to seventy-four pages, in which Mr. Moyle gives us a sketch of what continental jurists call the external history of the law of Rome down to the time of Justinian, and including his legislation. Then follows the text of the Institutes, according to Krüger's edition of 1877. Each book is preceded by a special introduction, containing an outline of its contents and arrangement, and an indication of the more important changes the institutions it describes had undergone in course of time. The text itself is accompanied (in footnotes) with a commentary, historical and exegetical; in bulk this contains, we should think, four or five times as much as the matter commented on, and is in effect a pretty complete exposition, from the lay writers, the Commentaries of Gaius, and the other parts of the Corpus Juris, of the details not only of the doctrines dealt with, but also of cognate ones untouched in the Institutes. An excursus on *capitis deminutio* is appended to the first book; two, dealing severally with *jura in re aliena* other than servitudes, and the law of possession, are appended to the second; the third is followed by half a dozen on (4) the origin and development of *bonorum possessio*, (5) the general nature of obligations, (6) *dolus, culpa, and casus*, (7) correality and solidarity, (8) the Roman literal contract and its history, and (9) agency; while one on the earlier history of Roman civil procedure is appropriately introduced at the end of the fourth book. Two excellent indices, one to the text, and the other a general index, complete the first volume, which contains nearly 700 pages. The second volume, extending to over 200 pages, is devoted to a translation of the Institutes, without any comment.

The introductory sketch presents a general view of the successive stages in the history of the law,—a commentary in fact on Justinian's description of its sources and channels in the second title of his Institutes. The state of matters in the regal period is brought under our notice; the constitutional reforms of Servius Tullius, which created the earliest really effective legislative assembly; the feuds between the orders which led first to the election of tribunes and the establishment of a plebeian comitia, then to the Decemvirate and the enactment of the Twelve Tables, and finally to the overthrow of the supremacy of the patricians; the institution of the prætorship and construction of the edict, to which Mr. Moyle attributes the introduction of the *jus gentium*, that henceforth so greatly altered the complexion of the Roman system; the rise of scientific jurisprudence, gradually advancing in aim and style, fostered by the imperial practice of granting to the most distinguished of the jurists of the day power authoritatively to lay down the law (*jura condere ex auctoritate principis*), and rising to its greatest eminence when the Antonines came to select for their most intimate counsellors the Papinians, and Pauls, and Ulpian; the legislation of the Senate, under such advisers,

when that of the comitia had become a political impossibility ; the emperors taking the legislative function upon themselves as Orientalism gained the ascendancy ; the codifications of the fourth and fifth centuries, and the famous "law of citations,"—a monument of the degradation the law had reached in the year of grace 426 ; the Romano-barbarian codes of the beginning of the sixth century ; and finally, the legislation of Justinian himself. The narrative is lucidly and accurately written. We are not sure, however, that we can altogether agree with Mr. Moyle in his estimate of the *jus gentium*, or in his view of the part played by the prætors in its introduction. And we should have liked if he had given us some account of the ante-Justinianian legal literature. He may not have deemed it within the scope of his Introduction ; but the Institutes of Gaius, the Rules of Ulpian, the Sentences of Paul, and the *Collatio Legum Mosaicarum et Romanarum*, are surely as deserving of mention as the Vatican Fragments and the Gregorian and Hermogenian Codes.

The Commentary on the text we regard as the most valuable part of the book. It has been written with much care, under constant reference to the Digest and the Code, and with the aid of authorities whose weight cannot be disputed,—Savigny, Puchta, Schrader, and Vangerow. We can hardly say that these are the "most recent" authorities, as Mr. Moyle seems to regard them ; Brinz and Windscheid, Bekker and Karlowa, Bruns and Ihering, now fill their places, and we should have been pleased to have seen the names of some of them on Mr. Moyle's pages. (There are occasional references to Ihering's *Geist des Röm. Rechts*, but not, we think, to any other of his voluminous writings.) But even without them the result on the whole is excellent ; we may instance as admirable specimens of comment the note on p. 542 on *stricti juris* and *bonae fidei* actions, that on p. 542 on compensation, and that on p. 544 on *in integrum restitutio*. Here and there, however, we observe a slip. Thus, on p. 237, Mr. Moyle confounds the *adscriptio*, mentioned by Ulpian as put on a testament by a witness, with the *subscriptio* required by Theodosius ; the former was in fact only the note put by the witness under his seal outside the document after it was tied up, while the latter was a signature appended to the document itself. On p. 264 he limits the Roman entail to three lives ; whereas, when the Institutes were published, its duration was indefinite, and it was only by the 159th Novel that it was provided that the fourth life—not the third—should take the estate free from the prohibition of alienation. On p. 271 he observes that the 115th Novel denied to ascendants and descendants the old *querela inofficiosi testamenti*, and "limited them to an *actio ad supplendam legitimam* ;" whereas the Novel really introduced in their favour what the civilians call a *querela nullitatis*. In various places he speaks of quasi-contracts and quasi-delicts ; such expressions, though too common with modern writers, are

tor's right of action on a claim might be assigned is also good; but we are inclined to think Mr. Moyle is not sufficiently cautious in what he says on p. 466 of the right of an assignee in the later law to sue in his own name by an *actio utilis*,—he puts the matter more accurately on p. 485, in his excursus on agency. On the general nature of obligation Mr. Moyle says: "The term *obligatio* properly indicates a legal relation between two definite persons, whereby the one (*creditor*, Dig. l. 16, 11) is entitled to a certain act or forbearance on the part of the other (*debtor*)." The "legal relation" here is probably Savigny's *Rechtsverhältniss*, or perhaps Justinian's *juris vinculum* in his definition of *obligatio* in the Institutes. But neither Justinian in that definition, nor Ulpian in the passage in the Digest referred to by Mr. Moyle, says that the parties to an obligation were necessarily creditor and debtor. All that Ulpian says is, that a creditor is a person "*cui ex qualibet causa debetur*." Obligation and debt, however, were not necessarily concurrent. When a man got a loan of a horse from a friend, he was under obligation (i.e. *obligatus*) to take good care of it; but he was not a debtor in respect of that obligation, nor his friend creditor, until he had failed to fulfil it, and a claim had thus arisen against him. Mr. Moyle continues: "The immediate result of an *obligatio* is the partial subjection (in law) of one person's will to that of another; the partial limitation of the debtor's freedom of action in favour of the creditor. . . . As Savigny remarks, the relation of obligation to personal freedom resembles that of servitude to *dominium*; it is, as it were, so much deducted from the ideal whole. But, as he also points out, the restriction must be partial only; if a man's freedom is not merely curtailed in favour of another, but absolutely resigned, this is not obligation, but slavery." This view of Savigny's, which Mr. Moyle adopts, has always appeared to us un-Roman; Brinz's explanation of "the idea of *obligatio*" in the first volume of Grünhut's *Zeitschrift* seems to us infinitely preferable. *Obligatio*, according to him, was a subjection not of a man's will but of his person to the will of another; this was the primitive idea of it; and although the effects of the *obligatio* underwent modification, the idea remained the same throughout. Comparative jurisprudence offers us examples from all parts of the world, some of them even in the present day, of men literally making *themselves* responsible for the fulfilment of their engagements, hypothecating *themselves* in security of them, and thus entitling those to whom they had come under liability to appropriate them on failure. That was what in early times the Roman plebeian did when he borrowed money from a patrician capitalist; as Varro tells us, he became *nexus* (or *obligatus*); and if he failed to repay the loan when due, his creditor took possession of him, and set him to work off by his labour the amount of his debt. The debtor's freedom was thus in the long run absolutely resigned (to use Savigny's words);

not, however, while he was merely *obligatus*—and that he was from the moment of contracting his loan—but only when he had definitely failed to fulfil his engagement. When in later times the practice of hypothecating specific things in security of an engagement of their owner became common, such things were often spoken of as *res obligatae*: they might eventually be taken possession of by the creditor if the debtor did not perform his undertaking; but till then, though *obligatae*—a substantial guarantee for performance—they were still the property of the debtor, free to be dealt with by him as his own. So with the *nexus* of the early law; the *nexum* or *obligatio* to which he had submitted in no respect deprived him of his freedom so long as he had not broken his engagement; he had only made his body, and with it all that belonged to him, security to his creditor for due performance. When, in course of time, the Poetilian law prohibited execution against the body of a debtor, still the idea of obligation remained unchanged; a borrower still made himself and all his belongings a security to his creditor for repayment when due; but on failure, thanks to the statute, the belongings, as pertinents of the *persona*, could alone be taken in execution. This, as Brinz has shown, was the idea of *obligatio* in Roman law; an idea which pervaded it throughout its whole history, and which alone can explain some rules that apart from it are a mystery.

In his account of the earlier Roman civil procedure, Mr. Moyle has been not much more fortunate than previous English writers on the same subject. It is curious that it should present so many difficulties to the English mind. Controversy about the forms of the old *legis actiones* is inevitable, so fragmentary is our information in regard to them. The procedure under the formular system, on the other hand, in all the main points of it at least, is put before us so plainly in the pages of Gaius, that we should have thought there was hardly any opportunity for going far astray in describing it. Yet so great an authority on Roman law generally as Mr. Sandars, in the introduction to his edition of the Institutes, has again and again (p. lxviii. of 7th ed.) presented to the student, as an illustration of a complete Roman formula, what would infallibly have been thrown out of any Roman court as contradictory and self-destructive. He has in view apparently an *actio venditi*,—a vendor's action for his price; for he begins with the narrative (*demonstratio*) that A. had sold N. a slave. As every one knows, sale was one of those contracts which gave rise to a *bonae fidei iudicium*, and in which the claim of the plaintiff was not for a specific sum, but for what, on consideration of all the circumstances (*ex fide bona*), the judge might find him entitled to. This Mr. Sandars has strangely overlooked; and instead of following up the narrative with an indefinite *intentio* and *condemnatio*, he has inserted those appropriate to a *condictio certi*, which was in the highest degree *stricti juris*. Apropos of this *condictio*, here is Mr.

Moyle's explanation of the difference between *actiones certae* and *incertae* (p. 629):—

“Certain actions *in personam* are divided into *certae* and *incertae*, according as the act claimed by the plaintiff relates to a *certum* (*res* or *pecunia*) or an *incertum*. In the former case—if, that is to say, the obligation of the defendant was to pay an ascertained sum of money, or to transfer a *res*, or a definite amount of some *res*, such as corn, wine, or oil, the *intentio* ran ‘*si paret (reum) . . . dare oportere* ;’ and if the *certum* were money, the action was substantially identical with the old *condictio* under the *lex Silia*, and involved a penal *sponsio* and *restipulatio* of a third of the sum in dispute. In the latter case—if, that is to say, the obligation of the defendant was *incertum*, i.e. not to transfer such *res* or *pecunia*, but to perform some other personal act or service—the proper word for the *intentio* was not *dare* but *facere*, though the two were usually combined, so that the *intentio* ran ‘*quidquid paret N. N. A. A. dare fecere oportere*.’ Personal actions on delict which were not penal but reparatory (e.g. *condictio furtiva*), claimed an *incertum*, and had a peculiar *intentio* (e.g. *si paret A. A. N. N. pro fure damnum decidere oportere*). These three forms of *intentio* in personal actions—*dare*, *dare facere*, and *pro damno decidere*—correspond to the common Roman division of obligations, according as they consist in *dando*, *faciendo*, or *praestando*.”

We should be sorry to say that this is an average sample of the excursus. It would be unfortunate if it were ; for it is really very faulty. Thus (1) *certum*, when used in the phrase *condictio certi*, meant money only,—not other things, however specific, Dig. xiii. 3, 1 ; xlii. 1, 6. (2) The penal *sponsio* and *restipulatio* were competent only when the claim was for *certa pecunia credita*, i.e. money due on a loan, a stipulation, or a literal contract, Gai. iv. §§ 13, 171,—not when founded on some other *causa*, Dig. xii. 1, 9, pr. (3) Even when competent, the penal *sponsio* was not necessarily “involved” in the *condictio* ; it was introduced by arrangement of parties,—*sponsionem facere permittitur*, Gai. iv. 171. (4) The words *pro fure damnum decidere* occurred not in the *condictio furtiva* but in the penal *actio furti*, Gai. iv. 37 ; the *intentio* of the *condictio furtiva* was in the ordinary form—*si paret reum dare oportere*, Gai. iv. 4. (5) There was no form of *intentio* in the words *pro damno decidere* known to the law, and *damnum decidere*, so far as appears, occurred only in the *actio furti* ; it could hardly, therefore, represent the large class of obligations *in praestando*. That class, as is generally assumed, included every obligation, whether civil or praetorian, that did not involve either a *dare* or a *facere*, taking these words in the technical signification attributed to them by the *jus civile* proper.

To Mr. Moyle's translation of the Institutes, the same praise is due that we have accorded to his commentary, but which we have felt unable to extend so unqualifiedly to his excursus. It is free, no doubt, but generally accurate, and clothed in appropriate language. Here and there it is deficient in terseness, particularly in its rendering of archaisms, such as the *uti legassit suae rei, ita jus esto*, etc. ; this vigorous imperative, so characteristic of the Twelve Tables, is hardly recognizable in the translation,—“the law shall

in future uphold all rights bestowed by a man's testamentary disposition of his property." Sometimes, on the other hand, accuracy is sacrificed to brevity. For example, in iii. 2, § 1, agnates are described as *quasi a patre cognati*, which is translated "cognates on the father's side." But this is misleading. A man's father's sister's children were his cognates on his father's side, but they were not his agnates; the phrase should rather be rendered "those who are cognate through their respective fathers." We observe a curious contrast between the commentary and the translation in this respect,—that while Mr. Moyle discards all technical words from the latter, he is scrupulous to a fault in retaining them in the former. We have in it, for example, such phrases as "the inheritance became *delata* to the *substituti*" (p. 273), "an *emptio* of a *res sperata*" (p. 423), "the *merces*, like the *pretium*, must be *certa* and *vera*, but need not be *justa*" (p. 424); in all of these—and there are scores like them—the Latin words might have been put in English equivalents without the slightest chance of misconception. In the translation, on the other hand, we are not sure that Mr. Moyle has retained a single word in its original form; even the *suus heres* gives way to "self-successor,"—an expression not very intelligible, though preferable perhaps to the "co-owner of the patrimony" of Mr. Mears, whose translation of Gaius and Justinian we noticed last month. We wonder that, with his conviction of the sufficiency of his own language to accurately represent the meaning of Latin technicalities, he should in his notes so often make use of foreign words, such as "*Rabatt* or *disconto*" for *interusurium*, *Vermögen* for *bona*, *Sachwerth* for *rerum rei pretium*.

We have been thus free with our criticism because we think that the literature of Roman law in this country has hitherto suffered from the want of it. Errors, as we have seen, are apt to be perpetuated when not pointed out; and the unkindest thing a reviewer can do is to give indiscriminate praise where he is conscious of defects. It is because we see so much merit in Mr. Moyle's two volumes that we have thought it right to point out wherein they fall short. We regard them as a valuable accession to the very limited number we possess of good books on Roman law. In the commentary, which is their principal feature, the student will find a most instructive companion to his Institutes. Any man who makes himself master of it will be able to boast that he has acquired a very intimate knowledge of all the more important parts of the *Corpus Juris Civilis*.

Delle Opere che illustrano il Notariato : Saggio di Dr. V. Pappafava.
Zara, 1880.

Not only to the student of comparative jurisprudence, but even to the practical lawyer, this "Essay by Dr. Pappafava, concerning the

works which treat of the Notarial Office," published at Zara, the capital of Dalmatia, the southernmost of the Austrian dominions, is a work of great value and interest. This so-called essay is really a critical catalogue of about five hundred works on the subject, chiefly Italian, German, and French, with most of which the learned author seems to have made himself intimately acquainted in the course of his preparation for his greater work on "Notarial Law in Austria." Premising that the business of a notary, as understood everywhere except in England and America, usually includes that of a solicitor or law-agent, so far as non-contentious, and reserving the anomalous position of a Scottish notary for after consideration, we cannot better describe this "Saggio" than by translating a portion of the learned author's preface:—

"There is perhaps no civil institution of greater utility than the office of a notary. . . . The confidant of his fellow-citizens, and their disinterested and authoritative counsellor, the interpreter of the laws, and the impartial framer of deeds and contracts, the notary is the trustiest and wisest auxiliary of the magistracy. . . . Impressing upon documents the seal of verity, the notary builds up the great monument of the civil life of nations, consolidates their fortunes, secures the repose of their families, and transmits to remote posterity, not only the laws and customs, but the language, the genius and proclivities, the religion, and all the leading characteristics which distinguish one people from another. . . . And accordingly, among all enlightened nations, this important institution has ever attracted the scrutiny of the historian, the analysis of the philosopher, and the interest of the publicist. We therefore find in all the principal States, and particularly in those which enjoy free institutions, . . . a most extensive and valuable literature on the subject of the notarial office. . . . On these grounds we venture to think that we shall render a not unimportant service to the students of notarial functions in presenting them with an alphabetical list of more than five hundred of the notarial works of every age and of every country. . . . We offer a few remarks on the method and scientific value of many of these works, occasionally quoting interesting extracts. . . . We have purposely entitled the work an 'Essay,' being sensible of its shortcomings, but we trust that we have at least merited the indulgence of our readers."

Lest to the practical and prosaic British practitioner these lofty views of the notarial office should seem to be those of an enthusiast or a visionary, we may add that similar sentiments are expressed by many of the five hundred authors enumerated by the learned doctor. It is also to be observed that foreign notaries, in the sense above mentioned, have almost invariably had a scientific university education in addition to their practical training, that they have very frequently graduated as doctors of law, and that in all cases they are required to pass an examination of considerable difficulty.

If we may judge from the numerous extracts cited by Dr. Pappafava, many of the treatises he names, while full of practical information, differ pleasantly from the average British law-book, in being frequently enlivened with historical anecdotes and *naïve* or humorous reflections, while their general tone is of a far more scientific and philosophical character. To lawyers of every class these works afford abundant instruction and interest, and to the soul of the much-maligned solicitor and attorney in particular they lay much flattering unction. Among other writers who dwell on the dignity and importance of the "notariate" may be mentioned Signor Giovanni Calza (*Dizionario del Notariato*, Torino, 1826), who "ventures to say that there is no part of the science of law with which notaries can afford to dispense . . . their office being perhaps the most useful and dignified among civil institutions." Still more emphatic is the language used by Don José de Las Casas, president of the Notarial Academy of Madrid (author of the *Diccionario del Notariado*, Madrid, 1854-57; and of an admirable *Tratado general de Notariado*, Madrid, 1877), who even declares that society could not exist without the notarial institution, the special mission of which is to watch over "property, the family, and succession." The last-named work is described by the sober German *Zeitschrift für Notariat* (1878) as at once philosophical, practical, and brilliant, treating fully and accurately of the law relating to notaries and registrars, the law of family rights, and the law of succession, and yet in a style glowing with the warmth of the sunny south. Among Italian authorities may be cited the learned author of the *Cenni dell' origine del Notariato* (Pavia, 1837), who tells us that "advocacy, though more brilliant than the notariate, contributes less to human happiness. . . . The latter profession, with its greater modesty and repose, inspires more confidence and conduces more to the public welfare." No less flattering to the non-forensic practitioner are the *dicta* of a French author, who declares that a worthy notary must possess a "profound knowledge of law, united with a pure heart and an upright spirit," and of Dr. Elia, an Italian jurist, who states that the chief glory of the profession has consisted throughout its whole history in "its unexampled honour and fidelity." We may also quote Dr. Gherardi (*Del Notaro*, Roma, 1877), whose estimate of lawyers differs *toto cælo* from that vulgarly prevalent. "The notary," he says, "is man's faithful friend and counsellor. He accompanies him in prosperity and adversity, in his pleasures and his griefs, rendering his life sweeter to him and death less bitter. He is the confidant of that affection which renders the youth dear to his betrothed, and in drawing up for them the conditions of their union which are to guide them to domestic felicity, he constantly reminds them of the sweetness of that first 'yes.' . . . And when the frugal father desires to transmit to his offspring the fruits of his honest labour,

it is the notary who receives them into his custody, and wonderfully multiplies them like the loaves in the miracle!"

Among thoroughly practical works may be noted that of Dr. C. Michelozzi (*Il Notariato*, Firenze, 1876), which is a commentary upon the new "Notarial Law" of Italy, passed in 1875. Among the many excellent rules which he lays down for the guidance of notaries, attorneys, and conveyancers, we find him insisting that "they should personally endeavour with their whole intelligence and experience to ascertain the wishes of the parties to a deed; they should be satisfied as to the capacity of the parties and the legality of their transaction; and they should express the intentions of the parties with the utmost possible clearness and brevity." One of the most valuable works mentioned by our author is Bolza's *Handbuch der Notare* (Neustadt, 1862), which is prefaced by a most interesting and elaborate history of the notarial office; and he also speaks favourably of Mr. Brooke's English work, but omits to notice the Scottish treatise *On the Office of a Notary*. Lastly, we may quote a few lines from M. Armand Dalloz with regard to the multifarious duties of a notary in France. By a salutary ordinance of 4th Jan. 1843, as he informs us, notaries are prohibited from engaging in any speculation on the stock exchange, or acting as brokers, or bankers, or managers of public companies. Among other duties incumbent on notaries, M. Dalloz inculcates that of abstaining from all attempts to withdraw clients from their professional brethren; and he lays it down that "they should scrupulously refrain from criticising or finding fault with the deeds drawn by their colleagues, but rather endeavour to palliate any defects they may find, and to confer secretly with their brethren as to how they may be remedied." If these excellent precepts are obeyed, how superior is the way in which things are managed in France!

Following, as usual, continental rather than English legal models, we have long been accustomed to use the term "notary" in Scotland in the wider European sense above mentioned. A Scottish notary may transact all kinds of legal business, so far as non-forensic, and he not unfrequently assumes the designation of "writer" or "solicitor." To a foreigner, however, this use of the term notary, and to our own countrymen such a use of the word solicitor, are very misleading. On the Continent a notary is invariably a lawyer, who has undergone a long and careful professional training and a thorough scientific education; in Scotland a notary, unless a member of one of the legal societies, rarely possesses such training and education, and is seldom in any proper sense of the word a lawyer at all. While the qualifications of an ordinary law-agent in this country fall far short of those generally required on the Continent of Europe, how vastly inferior are those of the average Scottish notary! If notaries are to continue to enjoy almost all the privileges of law-agents, surely the public has a right

to demand some higher guarantee than at present exists that they are duly qualified. There is probably no other civilised country in the world where unqualified persons are permitted to act as lawyers, just as there is probably none where such persons may act as medical men. In England, unqualified persons are rigorously prohibited by statute from acting as solicitors or attorneys, and in this matter we might advantageously follow the example of the sister country. It might perhaps not be reasonable to exact from intending notaries precisely the same preliminary training as that undergone by law-agents, but in justice to the public they ought certainly to be subjected to examinations at least as stringent. We can hardly venture to hope that the Scottish notary will ever occupy so high a position as the continental notary, either professionally or intellectually, but we may at least strongly urge the removal of the existing anomalies, and the introduction of a much-needed reform.

The Revenue Acts of 1880 and 1881 (43 Vict. cap. 14, and 44 Vict. cap. 15), so far as they relate to the new Death Duties imposed in respect of Personal Estate. By ALFRED HANSON, of the Middle Temple, Barrister-at-Law, Controller of Legacy and Succession Duties. London: Stevens and Haynes, 1883.

AMONG Scottish legal practitioners there has been no difference of opinion as to the expediency and justness of the alterations made by the Revenue Acts of 1880 and 1881 on death duties imposed in respect of personal estate. The distinction long made between testate and intestate estates, the payment of inventory duty on the gross amount of the estate, leaving the duty overpaid in respect of debts not deducted to be recovered afterwards by a troublesome application to the authorities, the levying of the duty on groups of estates between certain amounts instead of by an equal percentage, had long been felt to be anomalies. More trouble, however, was probably caused to all parties concerned by the 1 per cent. legacy duty, in connection with which the well-known "enquiries" as to whether the widows' interests had determined, etc., and claims for duty, long after the property itself had entirely disappeared, were most frequently made, than by any other of the anomalies now swept away. In an admirable introduction, Mr. Hanson shows the weak points of the old system, and gives a history of Mr. Dodds' efforts to remedy them—efforts which at last bore fruit in the Acts of 1880 and 1881. He then gives the sections of the Acts bearing on the death duties, with notes to assist in understanding their effect and scope. These notes are characterized by the same conciseness, clearness, and appositeness which distinguish those in his larger work on Probate, Legacy, and Succession Duties, to which the present work is supplemental. In an appendix

Mr. Hanson gives an extract from Mr. Gladstone's Budget speech of 4th April 1881, bearing on the new duties, the Treasury forms, directions, and lists of places where officers of Inland Revenue are appointed to carry out the provisions of the 33rd section of the Act of 1881. The forms are only applicable to England and Ireland. The addition of the forms applicable to Scotland would have been useful in a book which is certain to be much used by Scottish practitioners.

The Month.

Sir Archibald Alison.—*Apropos* of the notice of Sir Archibald in our last number, some remarkable anecdotes are told of the Baronet whilst Sheriff of Lanarkshire. His interlocutors, with the lengthy notes appended, were evidence of his great industry, though not always of his legal knowledge or accuracy.

In one case an agreement or obligation was alleged and founded on. In defence it was pled that the agreement could only be proved by a stamped writing. The Sheriff found that the agreement could be proved by parole, and *separatim* being *verbal* it did not require a stamp!

In another case he commenced an interlocutor thus: "In respect of the reasons assigned in the *annexed* notes, Decerns," etc. A very lengthy note was appended, all written, as was his usual practice, by himself. The first part gave sound reasons for the decerniture. But he commenced stating that, had there been certain circumstances, the decision must have been otherwise. At length he came on such certain circumstances which had occurred, and then, deleting the previous interlocutor, and amending some part of the introduction to the note, he proceeded strongly to state the *real* facts, and then concluded his judicial labour by another interlocutor worded thus: "For the reasons stated in the *prefixed* notes, assoilzies the defender," etc. A more critical judge would have had the interlocutor in its amended form written by another hand, but an honest simplicity and heedlessness of observation was one of his characteristics.

NESTOR.

VACATION ARRANGEMENTS.

The Lord Ordinary on the Bills will sit in Court on WEDNESDAY, 11th April, and WEDNESDAY, 9th May, each day at eleven o'clock, for the disposal of motions and other business falling under the 93rd section of "The Court of Session Act, 1868;" and Rolls will be taken up on MONDAY, 9th April, and MONDAY, 7th May, between the hours of eleven and twelve o'clock.

BILL-CHAMBER ROTATION OF JUDGES.—SPRING VACATION, 1883.

Wednesday, March 21, to Saturday, March 24—	Lord M'LAREN.
Monday, " 26, " April 7 " "	KINNEAR.
" April 9, " " 21 " "	SHAND.
" " 23, " May 5 " {	RUTHERFURD
" May 7, to meeting of Court, " "	CLARK.
	LEE.

BOX-DAYS.—SPRING VACATION, 1883.

EDINBURGH, 1st March 1883.—The Lords appoint THURSDAY the 5th day of April, and THURSDAY the 3rd day of May next, to be the box-days in the ensuing Vacation.

SPRING CIRCUITS, 1883.

South.

The Lord MONCREIFF, Lord JUSTICE-CLERK, and Lord YOUNG.

Ayr.—Tuesday, 27th March, at twelve o'clock.

Jedburgh.—Thursday, 29th March, at eleven o'clock.

Dumfries.—Tuesday, 3rd April, at twelve o'clock.

A. TAYLOR INNES, Esq., Advocate-Depute.

J. M. M'COSH, Clerk.

West.

Lords DEAS and ADAM.

Stirling.—Wednesday, 28th March, at eleven o'clock.

Inveraray.—Wednesday, 18th April, at eleven o'clock.

Glasgow.—Tuesday, 24th April, at half-past twelve o'clock.

RICHARD VARY CAMPBELL, Esq., Advocate-Depute.

ÆNEAS MACBEAN, Clerk.

North.

LORDS MURE and CRAIGHILL.

Inverness.—Tuesday, 27th March.

Aberdeen.—Tuesday, 3rd April.

Perth.—Tuesday, 17th April, at eleven o'clock.

Dundee.—Thursday, 19th April.

ÆNEAS J. G. MACKAY, Esq., Advocate-Depute.

HORACE SKEETE, Clerk.

IN *Pugh v. Telephone Association*, in considering the defendant right to cut off the plaintiff for "damning" over the wire, the Court, as may well be supposed, could not find any case exactly in point. The nearest approach is *Penlegrast v. Compton*, 8 C. & P. 462, an action of damages by a captain in the army, for breach of contract by a ship captain to carry the plaintiff and his wife as cuddy passengers on a voyage from Madras to England. The defendant undertook to justify, by showing that "the conduct of

the plaintiff was vulgar, offensive, indecorous, and unbecoming," and constituted good cause of exclusion from the cuddy. The Court said: "There is some evidence that he was in the habit of reaching across other passengers, and of taking potatoes and broiled bones with his fingers. It would be difficult to say, if it rested here, in what degree want of polish would, in point of law, warrant a captain in excluding a passenger from the cuddy. Conduct unbecoming a gentleman, in the strict sense of the word, might justify him; but in this case there is no imputation of the want of gentlemanly principle." The poet says (very ungrammatically),

"To swear is neither brave, polite, nor wise ;"

but, leaving out of question the precise moral status of the word "damn," we think the Court were right in justifying the shutting off of Mr. Pugh, on the ground that his language might accidentally startle some innocent "family circle," or shock the "the well-disposed females" who are the "operators at the Exchange," especially as the offender refused to promise not to do so any more, or, as he phrased it, to "eat dirt." The telephone is a very vexatious institution at times, but those who would use it should turn away their heads and speak in an "aside" when they are provoked to bad language.—*Albany Law Journal*.

The Scottish Law Magazine and Sheriff Court Reporter.

ABERDEENSHIRE SHERIFF COURT.

Sheriff COMRIE THOMSON.

Civil Imprisonment Act, 1882—Parochial Board—Alimentary Debt—Relief.—A case of considerable importance to parochial boards has just been decided in the Stonehaven Sheriff Court. It was brought under the new Civil Imprisonment Act, and is the first of its particular kind that has taken place in this district at least. Some months ago the Parochial Board of Fetteresso obtained decree against David Duncan, jun., ship captain, Stonehaven, in an action for the recovery of certain advances made by the Board to Duncan's father, and a petition was presented at the instance of John Tevendale, inspector of poor, Fetteresso, praying that, as Duncan had failed to pay the amount decerned for, he should, under the terms of the Act, be committed to prison for a period not exceeding six weeks, or until payment of the sums advanced by the Parochial Board to his deceased father.

The Sheriff in giving judgment said—This is a petition under the Civil Imprisonment Act of last session, at the instance of an inspector of poor on behalf of his Parochial Board, and is directed against a man to whose father, when in destitution, the Board made advances. The petitioner obtained a decree for these advances, and he now seeks to have the respondent sent to prison in respect of his failure to have the sum contained in the decree. The question involved is of wide application, is of much importance, has not been previously dealt with judicially, so far as I can discover, and I feel it to be attended with considerable difficulty. It is well known, imprisonment for debt was competent in Scotland until a very few years ago, when the sum decerned

for was above £8, 6s. 8d., and below that sum in certain enumerated cases, among which was "sums decerned for aliment." By recent legislation, imprisonment for debt was entirely abolished, irrespective of the amount, except again in certain specified cases, amongst which was included "sums decerned for aliment." Under such a decree a defaulting debtor could be incarcerated as formerly, the creditor being bound to maintain his debtor in prison at a rate fixed by the Sheriff. By the Act of last session the law on the subject was again altered, and imprisonment—that is, civil imprisonment, as it was called—for "sums decerned for aliment" was also abolished; but it was provided that a debtor failing to implement such a decree, or otherwise to satisfy his creditors, if the Sheriff is satisfied that his failure to do so is wilful, might be imprisoned for a period not exceeding six weeks at a time, on such a complaint as the present. The defaulter, on being sent to prison, is, however, not considered a "civil prisoner," but as a person guilty of contempt of Court, as a quasi-criminal, and is maintained at the public expense. It seems to me that if this complainer holds a decree "for aliment," he is entitled to obtain a warrant of imprisonment against his debtor, the respondent; but if, on the other hand, the decerniture he has obtained is not "for aliment," the petition must be dismissed. With no small amount of hesitation I have arrived at the conclusion that the latter is the view which I must adopt, and there will therefore be absolvitor. There is much to be said for a contrary opinion. The origin of the debt is purely alimentary. The respondent failed in his duty to support his father. If his father had sued him and got a decree which was not implemented by the son, the present proceedings, if at the father's instance, would plainly have been competent. It would have been a sum "decerned for aliment." I admit that there is an apparent anomaly in holding that the same remedy of imprisonment is not open to the Parochial Board which stepped in to prevent the father from utter destitution, and discharged the son's duty. Further, there is some authority for adopting a view adverse to that to which I have found myself bound to give effect. In a case disposed of in the Bill Chamber by Lord Craighill—*Gibson v. Wood*, 16th Sept. 1874 (*Poor Law Magazine*, 551)—his Lordship decided that such a decree as that held by the present complainer was a decree for aliment within the meaning of the Act of William IV. for abolishing imprisonment for civil debts of small amount, and was therefore competent to sustain imprisonment thereon, although the amount decerned for did not amount to £8, 6s. 8d. I confess I feel more pressed by this judgment than by any argument that has been presented or has occurred to me. But I may say, without any disrespect to the eminent judge who pronounced it, that I am not bound to regard it as a settlement of the law on the point, and, further, I am humbly of opinion that the course of subsequent legislation may fairly be supposed to have removed that decision from the category of binding precedents in such a question as that now before me. What is the decree which the complainer holds founded upon? Not on natural law, not on the common law, not on contract, but purely upon statute. The ground of his claim against the respondent is simply and solely the provision of 71st section of the Poor Law Act of 1845. It is here enacted, that where in any case a relief should be approved to a person found destitute, it shall be lawful for the Parochial Board to receive the monies expended in behalf of such poor persons from his parents, or from other persons who may be legally bound to maintain him. The respondent here is the person who is legally bound to maintain the pauper on whose behalf the monies were expended by the complainer's Board. But the action by which the Board has recourse against the defaulting relative, and is relieved of the advances it has made, does not seem to me to be an action in which the sum decerned for is "for aliment." It is of the essence of an action for aliment in the proper sense of that expression, that it shall conclude for termly payments in advance, in order to provide means for supplying from day to day the ordinary necessities of life. It is founded on *jus naturale*, is of a most summary nature, and the claims which it enforces are fortified by special sanctions. But the decree now under consideration is one

of relief for monies expended under a statutory obligation. It is an ordinary debt, but imprisonment for ordinary debt has been abolished. Nay, imprisonment for alimentary debt, in the sense in which the expression is used prior to 1882, has also been abolished. There has been substituted for it a kind of imprisonment, which can scarcely be justified except on the ground that the debtor has not merely failed to discharge his obligations to his creditor (a failure for which he cannot now be incarcerated), but has been guilty of a social wrong, an injury, not to an individual only, but to the state. I am therefore of opinion, though, as I have said, I am by no means free from doubt on the subject, that the peculiar form of diligence created by the Act of 1882, and of which this complainer now seeks to avail himself, is not competent when it follows on a decree in an action of relief, although the sums from payment of which relief is sought were extended on behalf of a poor person. The Parochial Board is not without its remedy, in the great majority of cases, when a parent or a husband fails in his duty to his children or wife. By the 80th section of the Poor Law Act, such defaulting persons shall be deemed vagabonds under the old Scots Act of 1579, for punishment of strange and idle beggars, and relief of the pure and impotent, and may be prosecuted criminally before the Sheriff, and on conviction sent to prison. The respondent is assolized.

Act. Falconer.—Alt. Gardner.

DYCE AND TOSH v. MILNE.

The action was brought by two Woodend millworkers, James Dyce and Elspet Tosh (not Joss, as previously reported), who sought to have Mr. John Milne, the registrar of the parish of Newhills, ordained to deliver a certificate of the publication of a notice of marriage between the petitioners, which certificate the registrar had declined to give in respect of an objection that had been lodged. The objection was withdrawn about a week after it was lodged, but the registrar contended that as it had been made, he could not issue a certificate of the intended marriage until there should be produced to him a certified copy of the judgment of a competent Court, to the effect that the parties were not, in respect of the objection, disqualified from contracting marriage.

“The Sheriff said—This application arises under the Marriage Notice Act of 1878. The circumstances are unprecedented, and the question is one of delicacy and importance. The petitioners, desiring to be married, gave notice on 9th February to the registrar, who accordingly posted a notice of their intention in terms of the Act. On the 14th February the defender, Mr. Russell, who is Free Church minister in Newhills, lodged an objection with the registrar on the ground that the parties were within the forbidden degrees of consanguinity. On 21st February, Mr. Russell sent to the registrar a document in the following terms, ‘I hereby withdraw the objection lodged by me on February, 14th inst., to the intention of marriage between the parties.’ The registrar refuses to issue a certificate of the intended marriage until there shall be produced to him a certified copy of the judgment of a competent Court of law to the effect that the parties are not in respect of the said objection disqualified from contracting such a marriage. It will thus be seen that the position taken up by the registrar is that when once an objection on the ground of consanguinity has been lodged to an intended marriage, the mere withdrawal of the objection, whether on the ground that it is unfounded in point of fact or untenable in point of law, does not restore matters to the position in which they were before the objection was lodged. He further maintains that there is only one way in which such an objection can be removed, and that is a judgment of the Supreme Court. At the first hearing of the cause I was inclined to hold that if the objection was seriously and not by collusion or other improper device withdrawn, the registrar might be justified in disregarding it, because the great hardship to the parties if the objection is not well founded is obvious. But a more deliberate consideration of the Act of Parliament and of the circumstances has led me to the conclusion that it is not my duty as judge ordinary to interfere.

No power is conferred on the Sheriff by the statute, and although the whole procedure is artificial, I feel that it would be straining my common law jurisdiction in this case to deal with what apparently is a *casus improvisus*. The Act of 1878 was passed in order to encourage the celebration of regular marriages. With that view, provision was made for the celebration of such marriages after notice to registrars. Accordingly it was enacted that a registrar's certificate of the publication of a notice of marriage should, for all purposes of law, be as effectual as a certificate of the due proclamation of banns under the old law. But this relaxation of the law was accompanied by careful provision being made for the mode in which objections to an intended marriage should be dealt with. Shortly stated, where the objection does not set forth a legal impediment, but relates to a formality or statutory requirement merely, such as inaccurate description of the parties, the registrar is to suspend the issuing of his certificate to consider the objection, make inquiry thereanent, and report to the Sheriff, who must deal with it. On the other hand, where the objection is that the persons intending to marry are within the forbidden degrees of consanguinity or affinity, or are, from any other legal incapacity, disqualified to give such consent as is necessary to marriage, and generally where the objection sets forth any legal impediment to a marriage, this provision is to take effect, viz. :—'The registrar shall suspend the issuing of his certificate until there shall be produced to him a certified copy of a judgment of a competent Court of law to the effect that the parties are not, in respect of the said objection, disqualified from contracting such marriage.' The facilities afforded here by the statute have been carefully fenced against abuse by attaching special and grave penalties to any false objection. In the present case the statutory form has been punctiliously observed. The objection is in these terms :—

" 'I hereby object to the aforesaid intention on the ground of consanguinity, the man (James Dyce) being the woman's (Elspet Tosh) step-grandfather, that is to say, Elspet Tosh is the daughter of a son of James Dyce's deceased wife. I hereby solemnly declare that the facts, as stated by me, in the written statement of objections to the marriage intended between James Dyce and Elspet Tosh, on which this declaration is endorsed, are true, to the best of my knowledge and belief, and I make this declaration, knowing that if this declaration is false, I expose myself to the pains and penalties of perjury.'

"As I have noticed above, this very solemn and circumstantial objection was a week afterwards simply withdrawn without explanation. I have no means of knowing what the relationship of the intended spouses really is, or whether there exists any relationship whatever between them, nor do I require to say whether, if the objector's facts are accurate, the law is as he assumes, but the objection has been lodged, and the terms of the statute are quite distinct as to what alone shall purge it. The question raised by the objector, and which has been laid before the registrar in a most deliberate manner and in compliance with the requirements of the Act of Parliament, is not one merely between him and the two people who want to marry. It is a matter which may affect the status of some persons alive and of others who have yet to be born. It concerns the public, and it is evidently for the sake of the public, and not merely for the parties primarily interested, that the giving of false information has been guarded with such serious penalties. I have no reason or right to doubt that the objector in this case acted conscientiously both in stating the objection and in withdrawing it. It is quite conceivable that a case may arise where such an objection might be stated frivolously or maliciously and withdrawn collusively. It seems to be to guard against this possibility that the statutory sanctions have been provided, but in the present case I gather from what appears on the face of the documents and from what was stated at the bar, that the objector does not mean really to do more than to cease from personally opposing the marriage. He still maintains that the objection he has stated is good in fact and in law. It is plain that his withdrawal cannot affect the facts or the law in one way or other. All that he has

done is to attempt to shift the responsibility from his own shoulders. 'I have given fair warning,' he virtually says, 'that this intended marriage will be an incestuous connection, and having done that I wash my hands of the whole business.' He may be right or wrong in this, and I am not at present called upon to express an opinion either way. It is sufficient that I do not think what he has done by his withdrawal would justify me in pronouncing any order upon the registrar which I could not have done if there had been no withdrawal of the objection. On these grounds I dismiss the petition, and in respect of the novelty and peculiarity of the circumstances, I shall make no order as to expenses."

Agents for the various parties:—Mr. R. B. Nicoll, solicitor, for the petitioners; Mr. Charles Ruxton, advocate, for the registrar; and Mr. James S. Butchart, advocate, for Rev. Mr. Russell.

SHERIFF COURT OF ABERDEEN, KINCARDINE, AND BANFF.

Sheriff SCOTT-MONCRIEFF.

BANFF SMALL DEBT COURT—FEBRUARY 13TH, 1883.

LOVE AND SON v. FLETT.

Cheque—Conditional Payment—Implied Consent.—Where sellers endorsed and cashed a bank order from their customer, containing the words "as settlement of account," held that they were barred from subsequently suing for a balance of this account alleged to be due.

The Sheriff-Substitute pronounced the following judgment:—

"The question for determination here is whether the pursuers, having received from the defender their debtor an order directing his banker to pay them a certain sum 'as settlement of account,' are now entitled, after having endorsed and cashed that order, to say that they accepted it as a payment to account only, and to sue him for the balance. I think they are not. In the first place, their actings imply consent. If the defender had come with a sum of money as settlement of the debt due to them and offered it personally, the fact of their taking the money from him would have been the best evidence of their acquiescence in such a settlement. It makes no difference that the money came to them in the shape of their cheque. But further, whether they consented or not, they were not, I think, warranted in cashing the defender's cheque, except for the purpose and to the effect for which it was sent. In the case of *Martin & Co. v. Steel & Craig*, as reported in the *Scottish Law Reporter*, vol. xvi. 216, Lord Deas said: 'It is an important and sound principle in our law, that if a man gets a document either for a specific purpose or upon a specific condition, he must either fulfil the purpose or implement the condition, or else restore the document.' Taking up the position which they do, the pursuers ought to have returned the cheque and refused to make any use of it."

Act. Morrison.—Alt. Watt.

SHERIFF COURT OF EDINBURGH.

Sheriffs RUTHERFURD and DAVIDSON.

GEORGE ALEXANDER v. ELIZABETH ROBERTSON.

Liability for Aliment of Illegitimate Child—Amount of such Aliment—Custody.—An illegitimate child was born to the pursuer on the 13th February 1878, of which the defender is the mother. At a meeting between the pursuer and defender in the preceding November, it was arranged that the child, when born, should be sent to the house of the pursuer, who would then be a married man. The pursuer, who is a farm servant, in his evidence stated, "I agreed to take it because she offered to pay me;" whereas the defender's statement

was, "He said he was not able to pay anything, but that he would take the child, and I would be free of it." The pursuer further rested his case upon the fact that he had at different times since the birth received money from the defender by way of aliment. The defender alleged that that money was given by her mother to keep the pursuer quiet without her consent, and was not paid as aliment.

The pursuer asked that the defender be ordered to pay him a sum of money, at the rate of £7 a year from the day the child came to his house, with interest, deducting the sums already paid, and to continue to do so till the child reached the age of twelve. He based his claim on his rights at common law.

The defender's first plea in law averred that "the action is incompetent and irrelevant, and ought to be dismissed, with expenses." This plea the Sheriff-Substitute repelled, with the following explanation:—

"*Note.*—An action of this nature at the instance of the father of an illegitimate child is unusual, but the Sheriff-Substitute is unable to hold that it is incompetent, or that the pursuer's averments are irrelevant. The obligation to aliment an illegitimate child arises *ex jure naturali*, and is incumbent on both parents, who are equally bound to contribute to its support, assuming their ability to do so. Accordingly, either of the parents who defrays the whole expense of supporting the child has a claim of relief against the other. In the present instance, it is alleged that the pursuer has had the care and custody of the child under an agreement between the parties, which is denied, and a proof has therefore been allowed.

"A. R."

At the proof, after evidence had been led, it was argued for the defender that the pursuer had failed to prove any agreement by which the defender became bound to contribute towards the child's support; that if there was any agreement at all, it was that the pursuer should free the defender of the child altogether; and that if no specific agreement had been made out by either party, the pursuer, having taken the child, had *ipso facto* relieved the defender of her liability to aliment the child.

This last branch of the argument was founded upon the following consideration:—

In law, the father of an illegitimate child has no right to demand the custody of the child. For a certain period, generally seven or ten years, the child must be left in the custody of the mother, the father paying aliment. At that age, however, the father may meet a claim for future aliment by offering to take the child. It was pleaded, therefore, that, with the consent of the defender, the pursuer had put himself in the same position from the birth of the child as he would have been entitled to put himself in, even without such consent, on the child reaching the age of ten (being a female).

The following cases were referred to as more or less bearing on the question:—*Thomson v. Westwood* (1842), 4 D. 839; *Weepers v. Heritors of Kennoway* (1844), 6 D. 1173; *Corrie v. Adair* (1860), 22 D. 900; *Buie v. Steven* (1863), 2 M. 222.

Further pleaded for defender, that arrears of aliment could not be claimed (*A. B. v. C. D.* (1842), 4 D. 670); that, in any case, the sum sued for was excessive (Lord M'Laren, on 9th June 1882, ordered a father to pay only £8 per annum for a legitimate child—case unreported); and lastly, that the mother was entitled at any moment to claim the custody of the child, and was anxious to lodge a minute offering to take the child now, reserving her future claims against the father.

The following is an extract from the interlocutor of the Sheriff-Substitute:—

"*Edinburgh, 13th December 1882.*—The Sheriff-Substitute . . . finds in point of law that the defender was and is liable to contribute along with the pursuer to the maintenance and aliment of the said child, but that the defender is entitled to its custody *in hoc statu*, and that the offer contained in the said

minute is a bar to the pursuer's claim against the defender to contribute to the said child's aliment from and after the 28th of November 1882, when the said minute was lodged in process: Finds that the amount which the defender is liable to contribute towards the aliment of the said child, from the 25th of February 1878, when it was given into the pursuer's custody, until the said 28th of November 1882, may be fairly calculated in the circumstances, and having due regard to the position of the parties, at the rate of £4 per annum: . . . Finds no expenses due to or by either party, and decerns.

"AND RUTHERFURD."

"*Note.*— . . . The pursuer's proof, which is partly founded upon an alleged admission by the defender in a letter which has been destroyed, is not, in the opinion of the Sheriff-Substitute, by any means conclusive as to there having been an express agreement between the parties to the effect stated by him upon record.

"Apart, however, from any evidence of an express agreement by the defender to contribute to the child's support, the Sheriff-Substitute thinks that she was liable to do so, unless she could prove, which she has failed to do, that the pursuer undertook the whole burden.

"For there can be no doubt that the mother of a bastard child is equally bound with the father to contribute to its support (*Bell's Prin.*, sec. 2062; *Comm.*, i. 681 (M'L.); *Fraser, Parent and Child*, 2nd edit., 123; *Poor Law Act*, 8 and 9 Vict. cap. 83, sec. 80). Obviously a claim for relief at the instance of the father can rarely occur, for the child is generally, and during pupillarity almost invariably, left in the custody of its mother; but the Sheriff-Substitute can see no distinction in principle between a claim at her instance for a proportion of aliment, or arrears of aliment, and a similar claim on the part of the father where the child has been left by the mother in his hands. The Sheriff-Substitute is therefore of opinion that the defender is bound to relieve the pursuer of a moiety of the expense incurred by him for the maintenance of their child; and taking into consideration the position of the parties, and that the wages of the defender, who is a domestic servant, have averaged about £16, he thinks that the extent of her liability may be fairly estimated at £4 per annum, and that the pursuer is entitled to be relieved at that rate of a portion of the expense which he has hitherto incurred.

"As regards the claim for future aliment, the case stands in a different position, for in the course of the discussion the defender's counsel stated that she is now willing to take the child into her own custody, and accordingly, on the suggestion of the Sheriff-Substitute, a minute containing an offer to that effect has been lodged in process. At first the Sheriff-Substitute was disposed to regard this offer with some jealousy, considering the time at which it was made, and the fact that the defender, being at present in a situation as a domestic servant, cannot receive the child in her actual keeping. For the mother is by law entitled to the custody, solely with a view to the child's benefit; and if it were to be taken from the pursuer's family merely to be farmed out as cheaply as possible, the reason upon which the legal rule is founded would of course fail. But on inquiry, it was stated at the bar that although the defender cannot herself undertake the care of the child in the meantime, she proposes to place it under the charge of her parents at Arbroath, and the Sheriff-Substitute sees no reason to suppose that it will not be taken care of by them as well as, or better than, it is at present by the pursuer and his wife. . . . In these circumstances the Sheriff-Substitute is of opinion that the pursuer's claim with reference to the future is barred by the offer now made by the defender.

"It is hardly necessary to say anything upon the question of expenses, but it appears to the Sheriff-Substitute that by the exercise of a little common sense upon either side, an appeal to the law would have been altogether unnecessary; and costs have therefore been awarded to neither party.

"A. R."

From this interlocutor the pursuer appealed to the Sheriff, who issued the following interlocutor:—

“*Edinburgh, 15th January 1883.*—The Sheriff, having considered the appeal for the pursuer, with the proof, productions, and whole process, and heard parties’ procurators—Adheres to the interlocutor appealed against: Finds the defender entitled to the expenses incurred by her under this appeal: Modifies these to One pound one shilling sterling, and decerns.

“ARCHD. DAVIDSON.”

“*Note.*—There can be no doubt that in the general case the mother of an illegitimate child is equally bound with the father to contribute to the child’s support. It cannot affect that obligation that by an arrangement the child is to be placed in the father’s custody, unless the father further undertakes to maintain the child without the mother’s assistance, and the child is actually so maintained in a sufficient manner. It is plain on the evidence that the defender was not relieved of her obligation in this case, and that certain contributions were actually made by or for her. This appeal was taken by the pursuer on the ground that only £4 per annum of arrears has been awarded to him. He says he should have £7 per annum. Now if the pursuer had shown that his actual expenditure in the past had exceeded £8 a year, that might have raised the question whether the sum actually expended had been spent usefully and properly. But there is no evidence and no averment that he has spent £14, or more than, or even as much as, £8 annually. As the case stands now, it is a question of past due aliment only. “A. D.”

Act. David Roberts, S.S.C.—*Alt.* Scott Moncrieff Pemeys, instructed by Mill & Bonar, W.S.

SHERIFF COURT OF LANARKSHIRE AT GLASGOW.

Sheriffs GUTHRIE and CLARK.

WILLIAM PASCOE v. JOHN E. SIMPSON.

Diligence—Meditatio fugæ—Competency Debtors (Scotland) Act, 1880 (33 & 34 Vict. cap. 34, section 4).—This is an action at the instance of William Pascoe, 327 Argyle Street, Glasgow, pursuer, against John E. Simpson, 28 York Street, Glasgow, in which the pursuer asked decree for £150 as damages, in respect, *inter alia*, of his apprehension as in *meditatione fugæ*. The pursuer asserted that on 31st May 1882 he was apprehended and taken to the office of Messrs. Barr & Carstairs, accountants, Queen Street, Glasgow, where he was detained for some time, and afterwards released by the defender’s order. The warrant for the pursuer’s apprehension was granted by the Sheriff-Substitute at Airdrie, and was dated 26th May 1882. It was admitted by the defender that he had presented a petition in the Sheriff Court at Airdrie, averring that the pursuer was owing him the sum of £80, and that he was about to leave the country without making provision for payment of the amount, and that the pursuer was apprehended in virtue of a warrant granted by the Sheriff-Substitute at Airdrie. The pursuer pleaded (1) that the application for and taking of said warrant, and subsequent apprehension and actings, were incompetent, wrongous, and oppressive; and (2) that the taking of pursuer to Messrs. Barr & Carstairs’ office, and subsequent detention there, were wrongous, oppressive, and illegal: and it was pleaded by the defender (1) that the pursuer, being at the time in *meditatione fugæ*, and the petition against him being regular and proper, defender should be assoilzied; (2) that pursuer’s apprehension being in terms of the warrant, he was entitled to absolvitor; and (3) that pursuer had sustained no damage. After proof, Sheriff Guthrie issued the following interlocutor and note, finding pursuer entitled to £5 of damages, and holding defender liable in three-fourths of expenses:—

“*Glasgow, 16th August 1882.*—Declares the proof closed, and having heard

of debtors actually possessed of means, is notorious to any one who has watched the operation of the Act. Yet it is plain that the new process mainly depends for its efficiency on securing the person of the debtor. Without that he could not be submitted to examination, he could not be searched, and the terror of imprisonment as a criminal in the event of concealment of effects, documents, or means would be in operation.

“This would seem to be so clear that, unless for a circumstance to be immediately referred to, no one would ever have imagined that the Legislature, when substituting the new cessio process for the old imprisonment, intended thereby to abolish the *meditatione fugæ* warrant. It is indeed very obvious that if that form of process was deemed a necessary adjunct of the old imprisonment, it is quite as necessary at least to the effective working of what has come in its place. Unless the debtor be detained until the debtor found caution *de judicio sisti*, the moment he found himself in danger of being sued for a debt which he had resolved not to pay, he would withdraw himself from the kingdom, taking with him what of his means he could readily convert into money or valuables, and concealing the rest so as to defy discovery. Why, therefore, did the Legislature deem it necessary to insert a special provision in the Act of 1880, to the effect that ‘nothing in this Act shall affect or prevent the apprehension or imprisonment of any person under a warrant granted against him as being in *meditatione fugæ*’? The answer, and it seems to me a most conclusive one, is to be found in the fact that in construing the Small Debt Act, which abolished imprisonment for sums under £8, 6s. 8d., the judges had held that this abolition carried with it the abolition of the *fugæ* warrant for sums under the said amount, on the ground apparently that the Scottish *fugæ* warrant was an outcome of imprisonment for debt, or at least depended for its validity upon, and could not stand without, the latter. It is open to doubt, indeed, whether even without the saving clause already recited in the Act of 1880, the reasoning in these old small debt cases would apply to the provisions of that Act. For imprisonment for small debt sums was abolished *simpliciter* by the Small Debt Acts, but, as already seen, the present Act abolishes it in its old and objectionable form only, to re-enact it in a new form much more severe, but free from the possibility of abuse. It is unnecessary, however, to insist on this view, for the Legislature, having distinctly declared that nothing contained in the Act shall prevent or affect the operation of the *fugæ* warrant, it is the duty of the Courts to give effect to that declaration in its full and natural sense.

“The case of *Kidd v. Hyde* was strongly relied on by the respondents at debate, and founded on by the Sheriff-Substitute in support of his judgment; but I fail to see that, when fairly considered, it can be made to bear the construction contended for. In that case the question the judges had to deal with was that of a *fugæ* warrant, applied for not only after decree had been issued, but after extract had been obtained. In the present case the *fugæ* warrant was applied for in the ordinary way, before action had been raised. In *Kidd’s* case the judges did not doubt the competency of the *fugæ* warrant, when it can be of any real use to the creditor; on the contrary, they expressly held that it was reserved by the Legislature in all such cases. They, however, held that when decree had already been obtained, and there could therefore be no object in apprehending the debtor on a *fugæ* warrant in order that a charge might be given him—a thing which could as easily and readily be done without—the *fugæ* warrant would serve no good purpose; and it was upon this ground that they held the application to be unnecessary and therefore incompetent. The present, and all similar cases, stand in a very different position. In them the *fugæ* warrant may be of the greatest use to the creditor, for the warrant is applied for before the action is raised; and if the pursuer really intends to leave the country, the creditor has no other means but those afforded by the *fugæ* warrant to compel him to abide the issue of proceedings to constitute the debt. The case therefore falls directly within the remark of Lord Rutherford Clark, whose opinion was concurred in by the

other judges, viz.—‘Now that diligence against the person is abolished by the Act of 1880, it may be urged that all apprehension on *meditatione fugæ* warrants falls with it. But the Act expressly declares that nothing contained in it shall affect the apprehension or imprisonment of any person under such warrants, and it is our duty to give effect to that declaration, in so far as the remedy can be of any possible use to the creditor.’ It therefore seems to me that in the present case, that remedy being one which would have been of great use to the creditor, assuming that his debt was justly due, and that his debtor was about to abscond from the jurisdiction of the Courts, it must be held as specially reserved by the Act, and one to which the tribunals are bound to give full effect.

“But having arrived at this conclusion, there remains the question whether the diligence was not abused,—that is to say, whether the pursuer was *in fuga* or not,—for if this question is not answered in the affirmative, it is plain that there was an abuse of the diligence, and that for this damages are due. It must be noticed, however, that the inquiry is not properly whether the pursuer intended to leave the country (for of that no man could be absolutely certain but himself), but whether he so expressed himself and acted as to warrant a man of ordinary intelligence in believing that he was. Now, on a perusal of the evidence, it humbly appears to me that if the pursuer did not intend to fly the country, his proved conduct was such as naturally to lead to that conclusion,—he uses expressions which could only have that meaning, and he seems to have succeeded in impressing that meaning on others than the defender; and this seems enough to decide the question. If he has incurred any damage by what took place, and of which there is very meagre proof, it seems only fair to say that he has himself to blame for what occurred. “F. W. C.”

Act. Duncan, Baird, & Young.—Act. Wallace & Wilson.

Notes of English, American, and Colonial Cases.

TRADE MARK.—*Trade Marks Registration Act, 1875, s. 6*—*Trade marks rules 17 and 19*—*New mark*—*Mark already registered in same class*—*Limited registration.*—Under the Trade Marks Registration Act, 1875, a new mark may be registered for some of the goods in a class, although a similar old mark has been already registered for other goods in the same class, if the respective goods are sufficiently distinct, so that no confusion can take place.—*In re F. Brady & Co.'s applications. In re The Shropshire Iron Co.'s Trade Marks*, 51 L. J. Rep. Ch. 637.

—*Trade Marks Registration Act, 1875, s. 6*—*Old mark*—*Limited registration*—*New mark*—*Similarity.*—A new mark may be registered in respect of some of the goods in a class, though a similar old mark is already registered for other goods in the same class, if the goods are distinct. Any mark used before the Trade Marks Registration Act, 1875, is an old mark only in respect of the goods as to which it has been used. So far as regards other goods it will be treated as a new mark, and will not be registered if it clashes with another mark which is old in respect of those goods. Old marks may be registered up to the number of three by different persons in respect of the same goods, even if identical; but this rule does not apply to new marks, and if the same old mark has been used in respect of the same goods by more than three different persons, it is a common mark.—*In re Jelley, Son & Jones's application*, 51 L. J. Rep. Ch. 639, n.

LIBEL.—*Injunction*—*Judicature Act, 1873 (36 and 37 Vict. c. 66), s. 25, sub-s. 8*—*Friendly society*—*Privileged communication.*—An interlocutory injunction was granted to restrain the circulation of an untrue statement as to the financial position of a friendly society.—*Hill v. Hart-Davis*, 51 L. J. Rep. Ch. 845.

A circular by a member of a friendly society issued to members for the purpose of obtaining a statutory investigation into the solvency of the society is not privileged unless true.—*Ibid.*

PATENT.—*Publication*—*Foreign book*—*Provisional specification*—*Construction*.—A witness had seen in a German journal in a public library in this country a description of an invention which he, though ignorant of German, by the aid of certain plates and technical words could make out,—*Held*, there had been publication of the invention.—*The United Telephone Co. (Lim.) v. Harrison, Cox-Walker, and Co.*, 51 L. J. Rep. Ch. 705.

Words in a provisional specification explanatory of methods to carry out the invention,—*Held*, not to include a machine that might be referred to by such words, but which was not within the scope of the invention as indicated by other parts of the document, or the “title,” and therefore a claim in the complete specification for such machine invalidated the patent.—*Ibid*.

MARINE INSURANCE.—*Valued policy*—*Total loss*—*Alabama claims*—*Compensation paid by State for difference between real and insured value*—*Right of underwriters to recover*.—The valuation in a valued policy is conclusive between the parties only for the purpose of the contract itself and of the rights arising from it.—*Burnand v. Rodocanachi* (H. L.), 51 L. J. Rep. Ch. 548.

Compensation paid *aliunde* to the assured, in respect of loss not covered by a valued policy, cannot be recovered by an underwriter who has paid as for a total loss; since the loss insured against is not diminished by the compensation, and the assured is not estopped from alleging that there was an excess in value above the amount agreed in the policy.—*Ibid*.

WRECK COMMISSIONER.—*Board of Trade inquiry*—*Right of appeal by owner*—42 and 43 Vict. c. 72, s. 2.—No right of appeal is given by 42 and 43 Vict. c. 72, s. 2, to the owner of a ship from the decision of the Wreck Commissioner upon an investigation into a shipping casualty.—*The Golden Sea*, 51 L. J. Rep. P. D. and A. 64.

MARINE INSURANCE.—*Partial loss*—*Sale of ship without repairing*—*Liability of underwriter to owner*—*Measure of loss*.—An insured ship was damaged during the continuance of the risk by perils insured against, and was sold by the owners without being repaired. The amount required to restore her to the same condition as she was in at the commencement of the risk would have exceeded her value when repaired, so that no reasonable uninsured owner would have repaired her. The owners having done some slight repairs for the purposes of sale, sold the ship, and then claimed to recover from the underwriters two-thirds of the cost of the repairs estimated as necessary to put the ship in the same condition as she was before the injury,—*Held*, by Jessel, M.R., and Cotton, L.J., *dissentiente* Brett, L.J., that the plaintiffs were not entitled to recover the amount claimed, and that the underwriters were only liable to pay the amount of the difference between the value of the ship at the port of departure, and the amount of the net proceeds of the sale after deducting the sum spent on repairs.—*Pitman v. The Universal Marine Ins. Co.* (App.), 51 L. J. Rep. Q.B.D. 561.

By Brett, L.J., that the estimated cost of repairs was the subject-matter of the insurance, and that the plaintiffs were entitled to recover the amount claimed.—*Ibid*.

TRADE MARK.—*Imitation likely to deceive ultimate purchaser*—*Evidence*.—An imitation of a trade mark will be restrained by injunction if it is likely to deceive the ultimate purchaser of goods.—*Johnston & Co. v. Orr Ewing & Co.* (H.L.), 51 L. J. Rep. Ch. 797.

Where the plaintiffs had acquired a trade mark for goods manufactured for the Indian market, the defendants were restrained from the use of a mark calculated to be mistaken for the plaintiffs’ by ignorant natives, though not by any one in the trade or able to read English.—*Ibid*.

TRADES UNIONS ACT, 1871, s. 4, sub-s. 3, a—*Action*—*Injunction*.—The objects of a trade union were to assist strikes and provide sick pay to members,—*Held*, that an action could be brought by members to restrain an amalgamation and the payment over of the funds of the society, inasmuch as it was not an action directly to enforce an agreement to provide benefits to members.—*Wolfe v. Mathews*, 51 L. J. Rep. Ch. 833.

THE JOURNAL OF JURISPRUDENCE.

JURISDICTION IN SCOTTISH PEERAGES.

A SELECT COMMITTEE of the House of Lords, with Lord Moncreiff as chairman, was last year appointed to inquire into two grievances complained of by the Peers of Scotland, and to provide a remedy for them. These were:—1. The want of any efficient mode of checking the votes of mere pretenders to peerages; 2. The widespread and growing dissatisfaction with which the tribunal, or commission of inquiry, which practically adjudicates on peerage claims, is viewed in Scotland, in respect both of the costliness and delay of the proceedings before it, and still more of its having been found unfitted for the investigation of questions involving a minute knowledge of our history, feudal law, and records. A considerable amount of evidence was led before this Committee, and a report drawn up. A Bill, introduced this session by the Lord Chancellor, bearing on the first only of these two evils, was read the second time on 10th April, and will be considered in Committee on the 4th May. Though it is being pressed through the House at a speed that hardly allows time for the due discussion of the constitutional innovations which it proposes, it is by no means on the same lines as the report of the Select Committee, diverging materially from the recommendations of their report in a direction certain not to meet with acceptance in Scotland.

Part of the evidence led before last year's Select Committee was historical, showing that the Court of Session was the *forum* for determining claims to dignities before the Union, that no change in this matter was introduced at the Union, and that the present mode of proceeding by reference to the Sovereign was based on usage and acquiescence only, not on statute. The Select Committee, without proposing to interfere with the practice of petitioning the Queen, suggested the expediency of questions regarding the rights to Scottish peerages being argued before and adjudicated by the Court of Session, under appeal to the House of Lords as a

judicial tribunal. Though the expediency of the change was the principal ground on which they went, they added, in referring to the historical evidence: "It does tend in a measure to show that the Court of Session is not an unsuitable tribunal of first instance in judging of such controversies. But they are strongly of opinion that the intimate relation which all such questions have to the history and records of Scotland before the Union, as well as to ancient Scottish laws regarding land rights and succession, must render the views of the Court of Session of material assistance in arriving at a satisfactory decision."

Since the date of the Committee's report an endeavour has been made to throw doubts on this historical evidence. A little book by Mr. Hewlett, a London solicitor, entitled, *Some Reasons against the Transfer of the Jurisdiction of the House of Lords in regard to Scottish Titles of Honour to the Court of Session*, has been widely circulated; and at the debate on the second reading of the Lord Chancellor's Bill, several Peers expressed doubts both whether the Court of Session ever possessed a jurisdiction in questions of this kind, and whether, if such jurisdiction ever existed, it was not expressly done away with by the Act of Union.

We quite agree with the Committee in considering this historical evidence of importance; and Mr. Hewlett is evidently of the same opinion, as he has devoted a large part of his book to an endeavour to refute it. In joining issue with him, as we here do, we must premise that it is only in as far as he relies on history, and not on *dicta* of Lord Mansfield or other law Lords, that we have any common *locus standi*. In a legal point of view, these *dicta*, though quoted by Mr. Hewlett as binding for all time to come, are acknowledged to have none of the force of a decision of the House of Lords sitting as a Court of Appeal; and being founded on very imperfect knowledge of the facts about which they would generalize, they are of still less value historically.

Yet one such *pronunciamento* is not only so much relied on by Mr. Hewlett, but so frequently mixed up by him with historical matter, that it will clear the ground to say a few words about it. "After 1214," said Lord Mansfield in his speech in the Sutherland case, "I think it clear that territorial peerages must have gone, because lands then became saleable." Or according to another report of the same speech, "The territorial principle must have ceased before 1214, when lands came *in commercio*, and adjudication went against them. When the *comitatus* did not carry the honour, a charter ought to be held only a conveyance of the estate" (Maidment's *Report of the Sutherland Case*, pp. 17, 40). It was this maxim that Mr. Riddell, the most learned of Scottish record scholars and peerage lawyers, appropriately called "a doctrine at the very sound of which all the records of Scotland might rise up and protest, as it was formerly said the stones of the causeway would have done at the whisper of a union with England."

History tells us that Scottish earldoms only began to be territorial half a century before the time when Lord Mansfield supposed that they ceased to be so. Documentary evidence further tells, that of the multitudes of extant and recorded charters of earldom, original and by progress, from the earliest date to 1578, only five can be named in which the dignity of Earl is directly mentioned,¹ and in four out of these five there is an obvious reason for its specification. In 1578, the practice began to vary, and from that date to 1600 half the charters of earldom (they were ten in all) did, and half did not specify the dignity. Yet in each and every case the grantee was recognised as Earl, and the line of heirs specified in the charters, original or by progress, enjoyed the dignity as well as the lands. Moreover, no one professes to have ever seen in record or charter-chest a patent or charter of the title of Earl apart from lands earlier than 1600, though, by Lord Mansfield's hypothesis, they were multitudinous, as there must have been a resignation of the title and corresponding patent in every one of the numerous cases where the destination of the landed earldom was altered on a resignation of the lands. The English fashion of Letters Patent was introduced in 1600, the first Earl by patent being Robert, Earl of Winton, so created in that year: but even then territorialism was not at once extinguished.²

Returning from this digression to the subject of jurisdiction in dignities before the Union, our contention is, that while dignities flowed from the Sovereign as the fountain of honour, disputes regarding succession to them were uniformly tried before the same *forum* as other civil rights, and that the most cogent record evidence exists of this fact. Before the institution of the Court of Session we have instances of such disputes being adjudicated

¹ These are—(1) The charter of Robert Bruce to his brother Edward, of the earldom of Carrick, by which his daughter Marjory was disinherited; (2) The charter of the earldom of Wigton, in 1341, to Sir Malcolm Fleming, in which Wigton was selected out of the various lands conveyed to give him his title; (3) The charter by James III. of certain lands which had no generic name, with the title of Earl of Glencairn, to Alexander Cunningham of Kilmaurs; (4) The charter of the earldom of Moray to James Stewart, natural son of James IV., in 1501; (5) The charter to Queen Mary's natural brother, in 1561–62, of the earldom of Mar, in which it was necessary to fix whether the future Regent was to be called by that title or by the earlier one of Moray, under which he was after all destined to play his part in history. The original charters of the earldoms of Crawford, Morton, and Cassillis, which are non-extant, may possibly have also contained mention of the dignity.

² How completely a grant of earldom implied that the grantee was an Earl, appears from the charter by Robert I. to his famous nephew Thomas Randolph, of the earldom of Moray, granted more than a century after Lord Mansfield supposed that territorial earldoms were at an end. The grantee is at the outset called "Thomas Ranulfi, miles:" the King's lands in Moray are erected into an earldom in his favour, and at the close of the charter he is called "dictus comes," though the word "comes" has never previously occurred. Again, in the same King's charter of the earldom of Carrick to his brother Edward, one of the few cases where the title is specifically mentioned, it is enumerated as one of the "pertinentia" of the lands.

by the King's Court, the King and Council, or the Justiciary, as ordinary causes then were.¹ The case of Lord Sinclair, in 1488, cannot properly be called an exception, it not being a contest about a title, but a Parliamentary ratification of a grant of lands and title to the disinherited grandson of the Earl of Caithness, "after the form of the charters and evidents made thereupon." Scottish charters were, for various reasons, often ratified in Parliament.

In 1532, the previously existing judicatories in civil causes, the Daily Council of James IV. and the Lords Auditors of Parliament, were superseded by the institution of the College of Justice, which was invested with the exclusive cognizance of all civil actions, including most assuredly disputes regarding the rights to dignities. We cannot agree with the suggestion made at the debate of 10th April by a noble and learned Lord (Watson), who, though a member of the Select Committee, was, to his regret and ours, unable to attend the sittings,—a suggestion which we are certain he would not have hazarded had he had fuller opportunity of investigating the subject,—namely, that the determination of disputes regarding honours lay with the King, who sometimes consulted the Privy Council, sometimes advised the parties to go to the Court of Session, and sometimes decided without consulting either. No doubt Charles I. and II., and even James VI. after he went to England, now and then "quicken'd the wings of justice" (to use an expression of Mr. Riddell) by enjoining the judges to proceed with dispatch in some plea pending before them,—a proceeding of which we have many instances quite unconnected with honours, as Secretary Alexander's Register testifies; but in every instance where this was done there was a full acknowledgment that the real jurisdiction lay with the Courts of law and not the Sovereign. Occasionally too, in grave emergencies, the King and Council acted summarily, but only till a decree could be obtained before the proper tribunal, or under reservation of the right of the aggrieved party to pursue before the Court of Session. One instance of this was the Decreet of Ranking of 1606; another, to which we shall allude by and by, was connected with the latest great family fight

¹ About the earliest recorded instance of what in modern phrase would be called a peerage dispute occurred in 1214, between two brothers, each claiming the earldom of Menteith, and is only known to us through an authenticated copy of the proceedings in the English patent rolls. It was heard and settled "in curia regis," before Alexander II. (not yet king), the Earls of Fife and Strathearn, the Chancellor, and some of the principal Barons (Riddell's *Remarks on Peerage Law connected with the Earldom of Devon*, p. 149). Another question regarding the same earldom was, according to Wyntoun (l. viii. c. 10), decided in 1285 by the King and his Council; and in the Replies of the eighty Scottish Commissioners to the questions of Edward I. regarding the succession to the Crown, reference is made to the case of the earldom of Athole, determined "in curia regis," which must have occurred early in the thirteenth century. The question between James II. and Lord Erskine about the earldom of Mar, in 1457, was tried before the Justiciary and an assize at the Justice ayre at Aberdeen.

in Scotland. But neither Council nor Parliament, on application of either claimant or King, ever did more than give *interim* possession, reserving the question of right to the Lords of Council and Session.

Referring to the twelve instances of the jurisdiction of the Court of Session adduced to the Select Committee (*Report*, p. 24, and *Appx.* p. 81), Mr. Hewlett asserts generally that the contention was really about the lands, "and if a decision of the Court as to the landed estates had any effect upon the dignity, it must have been by the sanction and allowance of the Sovereign or of the Parliament" (p. 20); and taking each instance separately, he explains them away as proving no more than this. We should except the cases of Arran and Kincardine, in which he virtually admits all that we contend for, though it is difficult to reconcile his admission in the former of these two cases (p. 24), that "the Court of Session had jurisdiction to reduce a resignation, and if a resignation were reduced, *to reduce all titles flowing from or grounded on it*," with his words which we have just quoted.

We hope readers interested in the subject will not think us tedious, if, taking each of the remaining ten cases separately, we show from the records that Mr. Hewlett is in error as to every one of them, and that these ten instances, as well as another adduced by Mr. Hewlett himself, present the strongest possible proof of the Court of Session being the only competent judicatory in honours.¹ It will be seen, by the way, that some of them also contribute an important quota to the large mass of evidence already adverted to of the continued connection between lands and dignities down to the beginning of the 17th century, which Mr. Hewlett so strenuously denies.

Morton.—"On 29th March 1542, the Court of Session, at the instance of James, Earl of Morton, reduced a charter of the earldom of Morton in favour of Robert Douglas of Lochleven, on the ground that the resignation on which it passed had been made on compulsion. The decret contains strong compromising reflections on James V." (*Report*, p. 81). Mr. Hewlett (p. 23) contends that, agreeably to Lord Mansfield's "*comitatus*" dictum, the writ reduced can have related to the lands only; and he enters on some later transactions regarding the same earldom, undeniably relating to the dignity, to show that in regard to them at least there was no *interventus* of the Court of Session. The fortunes of the earldom of Morton are throughout so curious and instructive, and its muniments of this date so exceptionally accessible, from most of them, including some not on record, being printed in the Morton Chartulary (Bannatyne Club), that we are tempted to follow the history of that dignity from 1540 down to the later period to which

¹ We mean, of course, as a tribunal of first instance. On the nature of the right of protestation admitted under the Claim of Right we do not here enter, as foreign to our subject.

Mr. Hewlett calls attention, in greater detail than our limits will permit us to do in reference to the other instances of jurisdiction.

James, third Earl of Morton, had in the closing years of the reign of James V. no male issue, but three daughters, the eldest and second married to the Duke of Chatelherault and Lord Maxwell respectively, and the third still unmarried. Besides the earldom of Morton in Nithsdale, he had extensive possessions in the Lothians and elsewhere. On 17th October 1540, he was induced or rather compelled by the King to resign the earldom of Morton and all his other lands in favour of Robert Douglas of Lochleven, who, though by no means his next heir male, was representative of the most important sub-branch of the Dalkeith Douglasses. The resignation is of the earldom *cum pertinentiis*, as are also the signature and charter and sasine in favour of Robert Douglas, there being in each case a reservation of the resigner's liferent and of a terce to his wife. Can it, we ask, be reasonably doubted that the Baron of Lochleven supposed himself not only fiar of the lands of Morton, but heir-presumptive to the title, which by Mr. Hewlett's theory would have devolved on the next heir male, Hugh Douglas of Borg, an insignificant Galloway laird? But Lochleven had in this transaction been made a tool of by the King. It was for himself that James had coveted the inheritance of Morton; and on 20th January 1540-41, he obtained from Lochleven a resignation of his reversion to it;¹ that resignation, however, being preceded by a notarial protest that what he was about to do he did by compulsion, under dread of losing his own lands of Lochleven should he refuse,—a protest which he repeated immediately after the transaction, and also once again on 17th December 1542.² This last repetition is accounted for by the circumstance that on the previous day James V. had died at Falkland Castle, broken-hearted at the double disaster of the rout of Solway Moss and the birth, instead of the son he hoped for, of his afterwards famous daughter, the unhappy Queen Mary. The redress which the accession of an infant Sovereign encouraged Morton to hope for was to be attained with the aid of a suitor for the hand of his youngest daughter Elizabeth, namely, James Douglas, of the Angus branch of the house, afterwards the Regent Morton. In a matrimonial contract into which this James and his father entered with the Earl of Morton, it is stipulated that the Earl "sall with all diligence procure and solicit for an adnulling of the infestment" (this word in those days meant not an instrument of sasine only, but the whole investiture) "maid be the said Lord Erll to Robert Douglas of Lochlevin," and infest James and Elizabeth in the same subjects.³ Morton accordingly raised a reduction of the resignation of 1540 and all that had followed on it, directed against the Crown, as represented by the Regent Arran, and Douglas of Lochleven. He was successful in his suit, the proceedings in

¹ *Registrum Honoris de Morton*, ii. p. 271. ² *Ibid.* pp. 270, 272, 273.

³ *Ibid.* p. 274.

which exhibited the late King in no favourable light, and what was properly the final decree is dated 23rd April 1543.¹ The day preceding this, the Earl of Morton granted a charter of his earldom and his other lands to the same James and Elizabeth, with other remainders and reservation of liferent and terce, of which charter he the same day got a Crown confirmation, there being as usual no separate mention of the dignity of Earl.² Thereupon James Douglas, the son-in-law, assumed the designation of "Master of Morton,"³ then the recognised style of the heir-apparent or presumptive of an Earl, and on his father-in-law's death he succeeded not to the lands only, but to the title of Earl of Morton, though husband of the Earl's *youngest* daughter. His charter of the earldom was again confirmed by Queen Mary when she came of age (mention being made in her charter of the "comitatus" having been resigned, but as usual not of the title of Earl), a grant further ratified in Parliament in 1567.⁴ Our readers will probably agree with us that it would require a faith sufficient to remove mountains to believe, with Mr. Hewlett, that these proceedings, including the reduction in the Court of Session, bore reference to the lands of Morton only.

But to go on to the later transaction, avowedly connected with the dignity, which Mr. Hewlett adduces in disproof of the Court of Session's jurisdiction in honours. In 1581, the Regent Morton suffered death and attainder for his alleged complicity in the murder of Darnley; and the same year John, Lord Maxwell, grandson (through his mother, the second daughter) of James, third Earl of Morton, obtained two charters of the barony and regality of Morton erected of new into a "comitatus," which were ratified in Parliament, the dignity being specified in the ratification, though not in the charters. These charters were revoked by an act of Privy Council on 9th April 1585, which, however, Maxwell disregarded, as holding by a charter unreduced by any competent authority; and he not only persistently designed himself Earl of Morton, but even sat as such in Parliament in December following.

However, on 29th January 1585-86, James VI. rescinded the Regent Morton's forfeiture, as an act, not of grace, but of justice, restoring his heirs to their honours, lands, offices, and possessions.⁵ By this restoration the earldom of Morton devolved first on Archibald, Earl of Angus, and soon after, in terms of a substitution in the already described investiture, on William Douglas of Lochleven. In 1592, however, the designation of Earl of Morton was unguardedly given to Lord Maxwell in an Act of Privy Council, a matter of which Douglas probably complained, for in a second Act of Privy Council of the same year, it was declared that this inadvertency should not prejudice the rights of William Douglas

¹ *Registrum Honoris de Morton*, pp. 281-293.

² *Ibid.* p. 271.

³ *Ibid.* pp. 294, 295.

⁴ *Acts of the Parliaments of Scotland*, ii. p. 562.

⁵ *Reg. Mag. Sig.* xxxvi. 549.

as Earl of Morton. Mr. Hewlett's assertion may be literally true, that "no matter connected with these proceedings appears to have come before the Court of Session;" but he forbears to mention that this last Act of Privy Council carefully alludes to the jurisdiction of that Court in these words: "Be it always understood that thir presentis sall naways hinder nor prejudice the forsaidis personis of any actioun quhilk they have or may have tuiching the decisioun of ather of thair richtes and titles pretended by thame to the said erledome befor the jugeis competent thairto as accordis of the law."¹ Our readers will here again probably agree with us that this transaction proves and not disproves the Court of Session's jurisdiction in dignities.

Angus.—"In 1588, the right to the earldom of Angus was litigated between James VI., as heir of line, and William Douglas of Glenbervie as heir male, and awarded by the Court of Session to the latter, who thereby became Earl of Angus" (*Report*, p. 81). The question turned on the validity of a charter of resignation of 1547, altering the limitation to heirs male, it having been under the original charter of 1389 to heirs of line. According to Mr. Hewlett, the charters both of 1389 and of 1547 (agreeably to Lord Mansfield's "comitatus" dictum) bore reference to the lands alone, and had the King been successful in this litigation, Douglas would (in virtue of Lord Mansfield's presumption in favour of heirs male) have been equally Earl of Angus, but without the lands. Most people will think it a sufficient reply that, had this been so, the defender would have figured in these legal proceedings as Earl of Angus, in place of which he is throughout designed "William Douglas of Glenbervie" (*Acts and Decrees*, l. cxx. f. 10). On the other hand, in a discharge by the King, dated soon after the decree (*Register of Deeds*, l. xxxv. f. 216), his designation is, "Our richt traist cousing William, *now*" (i.e. in virtue of this decree) "Erle of Angus."²

¹ *Privy Council Records*, iv. pp. 768, 769. The phraseology of the remainder of this Act, which our present limits prevent us quoting at length, is instructive for its reiterated averment that the *dignity* of Earl is in William Douglas along with the lands "as air of taillie of the erldome of Mortoun." The dispute was eventually arranged by the earldom of Nithsdale being conferred on Maxwell's son and successor, with the precedence of his father's earldom of Morton.

² Over and above Lord Mansfield's dicta, Mr. Hewlett adduces the first Earl's designation as "Lord of Angus" in his marriage contract (1397) as evidence that the charter of 1389 (granted on his mother's resignation, reserving her liferent, and with remainder to heirs of line) did not carry the title. The reservation of liferent would sufficiently account for his not at once adopting the style of Earl, if such could be shown to be the fact. No such inference, however, can be drawn from the use of the designation "Lord," which was in those days often applied to an Earl, even in the most formal documents. To Lord Hailes' instances (*Sutherland Case*, v. p. 32, and vi. p. 156), and those in the preface to vol. iv. of *The Exchequer Rolls of Scotland* (p. clxxxii.), may be added the style of "My Lord of Mortoun," given again and again in a formal decree of the Court of Session (to which we have already referred) to the third Earl of Morton (*Registrum Honoris de Morton*, ii. pp. 284, 285). Ignorance of

Eglinton.—The assumption by Sir Alexander Seton of the dignity of Earl of Eglinton on a questionable title gave offence to James VI., who asked the Privy Council to interfere. Mr. Hewlett says that the Council “advised the King to allow the Court of Session to determine” the question, and that the King refused to do so, assuming apparently that the King might constitutionally act by the advice of either tribunal or of no tribunal. The fact, however, is that the Council’s answer to the King is a decided refusal to act, on the ground that the question is not constitutionally competent to them, but to the Session: “the disputationis whilkis wald result and aryse thaerupoun could not be proper or competent to be handlit in this judgement” (*i.e.* judicatory); and an assurance is expressed that the King “will gratuslie accept this our refusall to tak upoun us the decisioun of a mater nowayes fitting nor competent to our plaices, since the mater may be formalie handlit and orderlie and summarlie prosecuted in the awne place and judgement.” Seton, in like manner, in his letter to the Privy Council, stands on his legal right to use the title, “sa lang as the same stands nather rescindit nor challengit be ordinar cours of law before the ordinary judges of this kingdome in all civil causes and tytles” (*Melrose Papers*, p. 115). The King, still unwilling to take the regular course of pursuing before the Court of Session (where, as has been seen, he had on a former occasion had the worst of it), endeavoured to get the Lord Advocate to browbeat Seton into a resignation. Seton, however, stood firm on his legal rights, refusing to obey any authority short of a decree of the Supreme Court, and the result was that the King so far yielded as to give him a patent, with all proper formalities, of the disputed dignity.¹

Strathern.—In 1633, Charles I. pursued in the Court of Session a reduction both of a service of the Earl of Menteith to David, Earl of Strathern, and also of the patent or confirmation of the dignity granted in consequence of it. By Mr. Hewlett’s account (p. 37), the Court of Session was the proper judicatory to consider and reduce the service; and with the service, the title, as based on it, fell to the ground of itself. But the facts are that the decree of Court expressly reduced, not only a service and a charter, but a patent of a dignity, a writ conveying no landed subject whatever, this fact, familiar to every one conversant with Scottish records, has again and again puzzled and misled Committees of Privileges.

¹ This case is further instructive as an indication that even after James VI. had gone to England, and patents of honours had been introduced, a charter of “comitatus” might in some circumstances be supposed to convey the title of Earl. The charter of resignation of 1611 to his maternal grandfather, under which Sir Alexander Seton succeeded, conveyed the “comitatus” of Eglinton without separate mention of the title. His right to the lands was unquestioned. James’ remonstrance was against his taking the title also, and its ground was, not, as might be supposed, that the charter, and the resignation on which it proceeded, bore reference to the lands only, but that the charter was granted under the cachet and without his knowledge, and therefore could not carry the honours.

as appears from Durie's report (*Mor.* 6691), the recorded decret, and the patent itself (*Reg. Mag. Sig.* liii. 48).

Oliphant.—Mr. Hewlett's explanation in this case of the Court of Session taking cognizance of the descent of a dignity, namely, that the accidental presence of the King gave the Court jurisdiction *pro hac vice*, will, we think, hardly be accepted by constitutional lawyers, more particularly as the action had not been raised by the King, or under any reference from the King, but by the denuded heir of line.

Coupar.—"James Elphinstone, Lord Coupar, in extreme age married a young wife, and resigned his honour and estates in favour of her, and any whom she might marry. A Crown charter passed on the resignation, but in 1671 the Court of Session, on the petition of the next heir, Lord Balmerinloch, reduced this charter on the ground that the resignation was executed on deathbed" (*Report*, p. 82). Had Mr. Hewlett examined the report of this case (*Mor.* 3292), he would have seen that the document in question was reduced both as a conveyance of the estates and of the title, and that on the head of deathbed. Throughout the proceedings, no question was raised about the charter being under the cachet.

Caithness.—In 1672, George, Earl of Caithness, executed a redeemable disposition of his lands and honours to his principal creditor, John Campbell of Glenorchy, providing that the title of Earl was to be assumed by him when his right to the lands became absolute, that is, after the lapse of six years. He soon afterwards made an Exchequer resignation of both lands and title. Next year Glenorchy had a Crown confirmation of this disposition, and sasine on it, no allusion occurring in either charter or sasine to the redeemable nature of his right. On the death of Earl George in 1676, Glenorchy laid claim to the dignity as well as the lands; while the nearest heir male, George Sinclair of Keiss, also assumed the title. The King was at first advised that the title belonged of right to Campbell (whose status was in reality in more than one respect questionable), granted him a new charter including both estates and title, and directed the Privy Council to make a proclamation against Sinclair designing himself Earl, which they did. But the vassals of the earldom resisted the change of master *vi et armis*, and in 1680, Glenorchy, under sanction of the authorities, invaded Caithness, defeated the Sinclairs, and not only possessed himself of the landed earldom of Caithness, as he was empowered to do, but seized Sinclair's paternal estate of Keiss, a proceeding which was made the subject of a complaint to Parliament.

In the same year, Charles II., convinced by his brother the Duke of York and the Privy Council that he had acted wrongly and rashly about the dignity, wished to see matters set right, and with this view required the two parties to go to the Court of Session to pursue their pretensions "*as use is in such cases.*" Mr. Hewlett considers that this advice was tendered about the Keiss question,

not the title of Earl; but had he, instead of forming surmises, referred to the King's letter (of date 22nd July 1681) in the Record Office, he would have seen that it related solely to the dignity.¹

Roths.—In Lord Lindores' claim, in 1682, to the earldom of Roths, made before the Privy Council, the Countess of Roths objected to the tribunal in respect that a declarator of Lord Lindores' right "is only competent before the judge ordinar." The Privy Council, in accordance with her contention, "*remit* the matter in debate to the Lords of Session, to be discussed by them as acords of the law." It may be a venial mistake in an English lawyer to interpret the word "remit" as if it meant, "refer for opinion;" but every one conversant with Scottish records knows that its meaning in our old law phraseology is to hand over a cause from an incompetent to a competent judicatory. See on this subject, Riddell's *Peerage Law*, pp. 37–39.

*Crawford.*²—In 1685, David Lindsay of Edzell, claiming to be Earl of Crawford, raised a reduction and declarator of his right before Parliament, the only instance in which such a procedure is known to have been attempted. The circumstance that not a vestige of this transaction was allowed to appear in the records of Parliament, shows clearly that the case must have been quashed by a preliminary objection to competency. Its incompetency is asserted by the two great contemporary lawyers, Nisbet and Steuart; and it is only through them, and through Mr. Riddell's discovery of the papers, that we know that such an action ever was contemplated.

Against all this amount of positive evidence no negative evidence has been produced; and, if we have trespassed somewhat on our readers' patience, we trust we have at least established our position,

¹ "Having received your letter of the 16th instant, bearing that there having been a petition presented to you by George Sinclair, representing that he is now served heir to George, Erle of Caithnes, his grandfather, and therefore supplicating that he may be allowed to sitt in the ensuing Parliament, and to bear the title enjoyed by his predecessouris, he being by an inquest of sworne men served heir male to them. To which petition it being answered by John, now Earle of Caithnes, that he possessed that title by a patent under our Great Seale, and had in the last convention and other meetings taken place by vertue thereof. And that you, considering that wee by our letter, bearing date the 17th January 1676, 1677, did order a proclamation to be issued discharging the said George Sinclair to assume the title of Erle of Caithnes or any of our subjects to give him that title untill our further pleasure should be known in their affaire. Whereupon, after your opinion unto us, that the said stop may be taken off, to the end that both parties may be left to pursue their severall rights before the judge ordinary *as use is in such cases*, we have now thought fit (upon full consideration of both their pretensions, and in concurrence with your said opinion) hereby to authorize and require you to remove the stop which was formerly laid by us upon the said George Sinclair from assuming the said title of Erle of Caithnes, and do suffer as well him as the said John Erle of Caithnesse to pursue their severall rights before the judge ordinary, *according to the custom in such cases provided*" (*Warrant Book for Scotland*, 1680–82, p. 408).

² Mr. Hewlett's discussion (p. 45) about the right of appeal has no bearing on the subject of applications to Parliament as a Court of first instance.

that down to the Union the Court of Session was the recognised tribunal of first instance in claims to dignities.

But, further, this jurisdiction was not abrogated by the Act of Union, Art. 9 of which expressly provides that the "Court of Session do remain in all time coming with the same authority and privileges as heretofore," that authority including, as we have seen, the jurisdiction in honours which in England the Sovereign had reserved to himself.

A provision in Art. 23 of the Act of Union has sometimes been referred to as if it bore on this matter, that all the Peers of Scotland "shall enjoy all privileges of Peers as fully as the Peers of England now do . . . except the right of sitting in the House of Lords and the privileges depending thereon, and particularly the right of sitting on the trials of Peers." It has been loosely said that the privileges of a Peer extend to a peerage claimant, and that one of these is to have his claim determined by the House of Lords. Or, as Mr. Hewlett puts it (p. 6): "As all were made Peers of the realm, the ancient practice of the House of Lords with regard to claims made by any person to be a Peer of the realm must extend alike to Scottish as well as to English titles of honour. The House of Lords has never permitted any question relating to a dignity in the peerage to be tried before the Courts of law." It is a sufficient answer to this, that the House of Lords has constitutionally no jurisdiction whatever in English peerage claims. The claimant petitions the Sovereign, who is under no constitutional obligation to ask the advice of the House of Lords, or to act on that advice when given; and as lately as the 17th century the reference was generally to the Chief Justices. Again, if peerage claimants enjoy this supposed but imaginary privilege of the peerage, it is difficult to see why they should not also enjoy the privilege of freedom from arrest, or of being tried by their Peers.

The practice of trying peerage claims before the Court of Session did certainly not cease at the Union. In one memorable case, twenty-three years after that event,—that of Lovat,—the Court sustained and exercised its jurisdiction. It was on the strength of the Court of Session's decision in 1730 in favour of the heir male, reducing a decree in absence before the Union in favour of the heir female, that Lord Lovat was impeached as a Peer and executed in 1747, after careful consideration of the matter by the highest authorities. In 1733, the Court again sustained its jurisdiction in a peerage claim (not pressed to a decision); and in 1740, in an official report to the House of Lords, the Scottish Court distinctly asserted its competency to deal with such questions, a contention which remained unchallenged by the Upper House. Along with all this, we doubtless have, from 1723 onwards, a continuous series of peerage claims referred to the Crown, and decided in nearly every instance on the report of the Committee of Privileges. Whether this contrary usage has so derogated from the jurisdiction

of the Court of Session that it is no longer competent for it to entertain a peerage claim if brought before it, we do not venture to say; but in connection with any changes to be made in the present practice, its anomalous origin suggests very strongly that Scottish peerage questions should not be placed at a disadvantage in comparison with English, as they have undeniably been in the past, and will be still more in the future should Lord Selborne's Bill become law without some very important modifications.

The evils, to redress which the Select Committee of 1882 was appointed, have undoubtedly arisen largely out of the practical exclusion of the Scottish judges from the decision of questions which presuppose an intimate acquaintance on the part of judges and counsel with the law of Scotland, not only as it is, but as it was. No tribunal or court of inquiry in England can possibly be equally competent to make the investigations required, or have the same facilities for making them as the Courts of Scotland. Experience has shown—as even English authorities admit—that when questions presupposing a minute knowledge of the record and historical side of Scottish law come to be discussed before Committees of Privileges by English counsel, or counsel who find it necessary to present their argument in conformity with certain traditional rules of interpretation, there is grave danger of other maxims being substituted for the proper rule,—namely, that of the law of Scotland as it was at the period when the rights under consideration emerged,—or of English law being substituted for Scottish. A further evil connected with the constitution of Committees of Privileges which applies, though in a very minor degree, to their adjudicating on English cases, is that they are an irresponsible body, from whom there is no appeal. No doubt, the Sovereign is not bound constitutionally to act by their advice, and may consult other advisers; but this is nowadays never done. The members of these Committees are but human; and irresponsibility makes all human tribunals autocratic. Had Lord Mansfield been a responsible judge, from whose sentence an appeal lay, he would hardly have used the words: "It is of importance that all questions concerning peerages should be settled on the principles of expediency as well as law" (Maidment's *Report of the Sutherland Case*, p. 18). We are not inclined to think the legal question connected with the Lindsay dukedom of Montrose so clear as the late lamented Earl of Crawford regarded it; but surely many of the incidents of the claim for that dignity when before the Committee of Privileges are such as could not possibly have occurred in a tribunal of first instance, acting with a due sense of responsibility, and a consciousness that its actings might be brought under review. When Lord Chelmsford, on hearing the venerable and trustworthy chronicler Wyntoun quoted, asked, "Who wrote that doggerel?" we would ascribe his remark not to levity, but to a profound ignorance both of the authorities for Scottish

history, and of the form in which authentic history was composed. But as a pendant to Lord Mansfield's views about expediency, we may quote the following from Lord Campbell's *Life of Brougham*, as an example of the light way in which English law Lords were habituated to look on their functions regarding peerage claims:—

“I have often rallied Brougham upon his creating William Courtenay Earl of Devon. He says he consulted Lord Chief-Justice Tenterden. But Tenterden knew nothing of peerage law, and must have come to a contrary conclusion if he had heard the question properly argued. When I was Attorney-General, Brougham was about to create another Earl, by making Mr. Hope Johnstone Earl of Annandale, and he had actually congratulated Mrs. Hope Johnstone as the Countess; but, with the assistance of Sir William Follett, I prevented him completing the creation, and the claim was disallowed.”

Most Scottish lawyers who have devoted their attention to peerage questions will admit that the following picture of the treatment which peerage claims from the northern part of this island have often met with is not overdrawn:—

“Those English counsel who plead in peerage claims . . . require . . . that the case and evidence of the claimant shall in the first instance be mastered by counsel of less distinction than themselves. There have been many instances in which the English counsel have objected to the expositions of law which they were called on to advocate, have struck out or altered passages in the original cases, or taken their own line in advocacy, confident in their superior knowledge of what would be most effective with the law Lords before whom they plead—acting with the best intention for their clients, but at the risk of running upon sunken rocks, through their ignorance of the foreign sea they were venturing upon. The greatest possible consequence is attached to a counsel possessing the ear of the House; and when that is the case, the tendency to subordinate Scottish to English views is very strong with such leaders. . . . The tendency to dissipation and adulteration which Scottish doctrine is subject to through this transmission of intelligence, or rather this darkening of knowledge, is frequently aggravated by the extreme difficulty experienced by the claimant, or by his Scottish counsel, in getting the English counsel to take in and adopt and act upon the principles of Scottish law,—opposed as many of these are to the private rules and traditions of the House, or to comprehend the constitution of the Scottish Parliament, the Scottish Courts of law, and Scottish feudalism generally.

“We have next to consider who the law Lords are. They are, with the rarest possible exceptions, English lawyers, untrained in the ancient feudal and peerage laws of Scotland. . . . It is not to be wondered at that these men, so able, so honest, so great in their own department, who are overwhelmed by multifarious occupations incidental to their exalted posts, should find it impossible to descend by patient study beneath modern and English prejudice to the fundamental principles which are binding upon a Scottish court of inquiry. As matter of fact, they are dependent, as a rule, for their knowledge of the Scottish law they have to administer upon the pleadings of counsel—English counsel; and when, as not unfrequently happens, the counsel pleading before them is staggered by some unexpected question started, involving fundamental principles upon which his argument, or that of his opponent, rests,—a fallacy perhaps in view, which he feels impotent to deal with,—a difficulty which a Scottish feudal or antiquarian lawyer only could elucidate, they have to feel their way towards the truth, often to be gravelled at the threshold through simple deficiency in that knowledge which would overleap the difficulty, and which counsel, unprepared for the emergency, is not capable of supplying. It is a sad exemplification of the old experience of the blind leading the blind, and both falling into the ditch. I need scarcely observe that the theory of the perfect

judge implies a knowledge in him superior to that of the counsel pleading before him, so that between their arguments he is able to distinguish and affirm the truth.

“It has been in consequence of this second-hand and imperfect character of the arguments addressed to Committees of Privileges, that they have been encouraged to assume that there was nothing settled in the law of peerage in Scotland previously to the Union, and to form rules of their own, which they adopted and transmitted to their successors, in the belief that there was no ascertained and solid ground to stand upon in Scottish law. They thus drifted upon shoals of error, upon which they built what they mistook for beacons of enlightenment, in the shape of rules and traditions which have led subsequent generations astray. . . . The result is that Committees of Privileges on peerage claims, and especially on Scottish claims, exhibit the spectacle, not of duly constituted Courts of law, acting on principles of solidity and permanency, but of consultative bodies, shifty, nebulous, erratic, without any assigned or permanent status in the firmament of justice, bodies which hold themselves to be bound by no precedent or authority, claiming a large (I would say unlimited) discretion, sitting loose occasionally even to their own precedents and traditions, so that there can be no confidence on the part of those who calculate on their consistency, when submitting their claims to their consideration, that the ruling of yesterday will be the same to-day or to-morrow,—autocratic in practice if not in principle, and practically irresponsible” (Lord Crawford’s *Earldom of Mar*, pp. 574–78).

Mr. Æneas Mackay, in his evidence before the Select Committee of last year, stated that the Cassillis, Glencairn, and Spynie decisions “could be reconciled only with great difficulty with the decision in the Sutherland case and with the decision in the more recent Herries case; it is a work of art to do it.” We would add that it is impossible for any lawyer by any conceivable process of art to reconcile the case of Sutherland with that of Mar, or either the Cassillis or the Mar case with that of Balfour of Burley. The fact is, that when English lawyers in 1762 and following years took to formulating maxims as guides to their successors, they were both overstepping their province as advisers of the Crown *pro hac vice*, and dealing with a system of law with whose principles and history they were unacquainted. Their maxims, however, though grievously misleading, were treasured up by later Committees as words of wisdom. In the case of Mar they were pushed *à outrance*,—applied in a way that would have astonished their authors,—and only in a few cases like that of Balfour they were set aside for the pure law of Scotland. Scottish historical and record scholars knew all along how erroneous the maxims formulated in the Cassillis and Sutherland cases were; but their voices were in a measure suppressed by the consideration that neither in those cases nor in others that followed them, had actual wrong been done,—the decision itself was right, if some of the grounds of it were legally indefensible. Recent events, however, have much intensified the national feeling on this subject. The Lord Chancellor’s Bill is looked on as legislation in the wrong direction, as likely to increase the evils for which last year’s Select Committee sought to find a remedy. A large number of our Peers have emphatically protested against it; and it has been petitioned against by nearly

a hundred of our most distinguished lawyers and chief historical scholars. A committee of the Faculty of Advocates has been appointed to consider it, who cannot possibly report before the meeting of the Court on the 12th of May. Yet it is determined that the Bill is to go into the Committee stage on the 4th of May, without waiting for the opinion of Scottish lawyers, which ought surely to be discussed in the Lords, and not the Commons.

It may be said that it is only the electoral qualification that is directly touched by this Bill; and it is certainly to be regretted that one branch of the subject before the Select Committee should have been taken up without the other; for the recommendation that evidence in future claims shall be taken before the Court of Session necessarily connects itself with some of the proposals of the Bill regarding the determination of the electoral right, and it is impossible that the smaller evil can be effectually cured without providing a remedy for the greater one.

It is in conformity with the recommendation of the Select Committee that the Bill provides for an electoral roll of individual Peers to be used at Holyrood, and that representative Peers past and present, Peers who have voted without question for twenty years, and Peers whose claims have been submitted to the Sovereign and allowed, should, as a matter of routine, be placed on the roll by the Lord Clerk Register. The scheme, however, has been rendered practically useless by the omission of the further recommendation, that votes which had been protested against should be the subject of a reference to the Court of Session, which should report its opinion to the House of Lords. To us it seems the most natural and satisfactory solution of the difficulties to which unchecked voting has given rise, that the Scottish judges, the most competent officers for the purpose, should act as a registration Court, with this check on them, that it would be in the power of any one excluded by them to petition the Sovereign regarding his ultimate right, and on getting a favourable decision the electoral qualification would of necessity follow. By Lord Selborne's Bill a Peer whose vote has been challenged—whether on grounds entirely frivolous, or on a point connected with the niceties of Scottish historical law—must petition the Queen, and have the question remitted to the House of Lords and the Committee of Privileges with only a permissive power to the latter to consult the Scottish judges on any point regarding which they are not satisfied. Equally objectionable is the proposal to place an irresponsible power in the hands of the Chancellor—an English lawyer—to determine questions of succession to our peerages. If it be said that the Lord Chancellor has already that power in Irish peerages (a power, by the way, which Sir Bernard Burke's evidence shows to be more a name than a reality), the cases of the two countries are utterly different. The Irish peerage law is the English: that of Scotland is a subject requiring separate study, and one regarding

which the present grievance is that Lords Chancellor have so often gone astray.

But of all the provisions of the Bill, the most uncalled for, and most unconstitutional, is the proposal to invest the House of Lords with a power to tamper with the precedence of Peers on the Union Roll. In 1606, the precedence of the nobility of Scotland was regulated by the decree of a special Commission, including the highest Officers of State, and the greatest lawyers and legal antiquaries of the day. The whole nobility were summoned to produce their writs, and the public records were ransacked for evidence. The evidence must have been carefully considered, for the order of the Peers, so far as it depended on priority of writs, was in close conformity with the writs exhibited. The assertions to the contrary which have been often made, and which Mr. Hewlett reiterates, are based on ignoring one factor which the Commissioners took into account, the old-established precedences from office or privilege, a matter about which much evidence may be gleaned from the Scottish records.¹ Privilege or office, and not priority of creation, was the cause why Angus, Argyle, Crawford, Erroll, and Marischal preceded all the other Earls. Next came the two oldest Earls, Sutherland and Mar, the former producing titles dating from 1347, the latter from 1395 and 1404. Then followed Rothes, whose oldest charter was dated 1459,² and so on. The "Lords" who were present were all arranged according to priority of writs produced; but with Earls or Lords who were absent and unrepresented, the Commissioners had no certain basis to go on; hence the incorrect position of Caithness and Buchan among the Earls, of Fleming (too high) and Maxwell, and several who follow him (too low), among the Lords. This ranking was, by its terms, but an interim decret, challengeable by any aggrieved Peer in the Court of Session, and was often challenged, both by Earls who demurred to the recognition by the Commissioners of rights based on privilege or office, and by Peers who had been absent, or had

¹ Till the middle of the 16th century there seems to have been no recognition of precedence in virtue of priority of creation. In the 15th century the idea of the great Earls of Douglas or Crawford yielding the *pas* to an Earl of older date (*e.g.* Ross or Sutherland) would have been unintelligible. The right of Angus (who came in place of Douglas) to bear the crown and precede all Earls (if not Dukes) was recognised in Parliament in 1592, and by charter of 1599. On public occasions, when Angus bore the crown, Argyle, who also held the hereditary office of justiciary, bore the sceptre; and, by contemporary evidence, Crawford's privilege of bearing the sword was equally acknowledged. As the Constable and Marischal were both Commissioners, it would have been strange if their official precedence, often alluded to in the records, had been unrecognised. It was the clashing of the new ideas with the old that had caused the unseemly scenes in Parliament, and that led to the appointment of the Commission of 1606. This subject is more fully discussed in a former paper in this journal, vol. xvi. p. 57.

² Menteith was in 1639 interposed between Mar and Rothes, in consequence of the precedence of 1428 being assigned him in his charter of the earldom of Airth.

discovered older writs than those produced to the Commissioners. After the forty years' prescription was introduced (1617), Peers who thought themselves placed too low, but had no immediate idea of litigating the question, got into the habit of protesting in Parliament to save their rights from lapsing. On various occasions the Court of Session, on cause shown, altered the ranking of the decreet. The Court of Session was undeniably the tribunal for adjudicating on precedence questions, and the Union Roll is simply the decreet, with the alterations made by that Court, the omission of titles extinct, attainted, or merged in higher ones, and the addition of later creations.

At the Union several protests for precedence stood on the records of our Parliament ; and the Union Roll was received by the House of Lords with an express reservation of their validity. Processes for precedence continued as competent to the Court as before. One of these, carried on at intervals by the Earl of Sutherland against Peers ranked above him, was awakened in 1746 ; and the House of Lords recognised the validity of this waking by giving intimation to the Earls of Crawford and Erroll, as interested in the Sutherland claim of 1770 ; and by appointing counsel to be heard on their behalf. If the jurisdiction of the Court of Session in peerage claims is to be considered as lapsed by the adoption for so long a time of references to the Sovereign, no such supersession can be alleged in respect of precedence cases. Such questions have never been adjudicated on by the House of Lords, either directly as a Court of first instance, or under a reference from the Sovereign. This was acknowledged by the noble Lord who is the author of the present Bill, and who, on 9th July 1877, on a debate on a proposal to alter the position of one of the titles on the Union Roll, expressed himself as follows :—

“No precedent has been referred to for changing by a resolution of this House the precedence of any existing peerage which stands there. . . . My inquiries lead me to entertain a most serious doubt whether it would not be against the spirit of Acts of Parliament upon the subject for your Lordships to assume any such jurisdiction. . . . The precedence of the Scottish Peers was settled by James VI. in the year 1606. . . . The King says that the Peers were to have the precedence which the Commissioners might assign to them, that all persons were to give them that precedence, and that they were to have it on all occasions, subject only to a power that was reserved, not to the House of Lords of Scotland,¹—if there had been such a power it might perhaps have descended to this House after the Union,—but to the Court of Session in Scotland, to rectify that precedence, if it was in any respect erroneous, upon the complaint of any person aggrieved by it. . . . The truth is, that your Lordships are invited to enter upon a field which does not belong to your jurisdiction at all.”

Precedency actions are therefore, as Lord Selborne rightly states, still as competent as ever to the Court of Session, though in many

¹ This could only have been a momentary *lapsus* on the part of Lord Selborne, who was doubtless well aware that our Parliament consisted of but one chamber.

or most cases they would be barred by the plea of prescription. Except in a few instances, the present ranking has been long acquiesced in.

Article 18 of the Treaty of Union provides that there is to be "this difference betwixt the laws concerning public right, policy, and civil government, and those that concern private right," that the former "may be made the same throughout the whole United Kingdom, but that no alteration be made in the laws of private right except for the evident utility of the subjects within Scotland." Is it, we Scotchmen are entitled to ask, "for the evident utility of the subjects within Scotland" that this bar of prescription should be removed and such questions indiscriminately opened up? And, if so, we should further ask, is it for our "evident utility" that these questions, often involving the most intricate investigations regarding the import of old Scottish charters, should be removed from a Court composed of the most learned Scottish lawyers of the day, to a tribunal so unfitted for the purpose as a Committee of Privileges?

One of Mr. Hewlett's observations regarding the suggestion of the Select Committee, that votes given under protest should be referred to the Court of Session, is that, were this done, the question might be opened up which was settled by the Mar decision of 1857. There can be no doubt that the adjudication to the Earl of Kellie of the earldom of Mar, claimed as a creation of 1565, is looked on by every Scottish record scholar, and nearly every Scottish lawyer who has paid attention to the subject (we of course except the professional advisers of the noble claimant), as having been based on a resolution erroneous both in law and in fact. But, as a competent decerniture, it must be acquiesced in by the Court of Session. Nevertheless, as Lord Cairns said in the debate of 1877 already alluded to, "we ought to be very careful not to go beyond what the decision actually was." And the report of the Select Committee in whose appointment that debate resulted, drawn up by the same noble and learned Lord, himself one of the Committee of Privileges who concurred in the resolution of 1875, frankly admits that that resolution did not necessarily extinguish the ancient earldom. It recognises that a claim may yet be competently made by the heir general "to an earldom of Mar older than and different from that which, according to the resolution of the House, was created by Queen Mary in 1565;" and, referring to the interpretation by the late Lord Clerk Register of the order to him "to call the title of the Earl of Mar according to its place on the Roll of Peers of Scotland called at an election," it remarks:—

"Where since the Union a title has been established to a Scotch peerage not on the Union Roll, the peerage to which the title has been so established has been placed upon the Roll in its proper precedence according to the Resolution of the House. . . . It may be a question whether, under this Resolution, it was the duty of the Lord Clerk Register to call the earldom of Mar in the place in which the earldom of Mar actually stands on the Union Roll, or in

what would be the place of an earldom of Mar created in 1565 ; but it appears that the Lord Clerk Register called it in the place in which it actually stands on the Union Roll."

The noble Earl who now holds the office of Lord Clerk Register, in his evidence before the Select Committee of 1882, was asked his opinion of how his predecessor ought to have acted on receiving such an order, and his reply was (*Report*, p. 17) : "Whoever had the misfortune to be Lord Clerk Register at that time would have to act upon his own judgment as to whether there was a *prima facie* probability of there being an older earldom of Mar, and if so, he might be inclined to receive the vote. . . . It would be a question of extreme difficulty and delicacy, and I am extremely thankful that it has never fallen to my lot to administer it."

Mr. Hewlett is therefore, on every ground, wrong in contending that the decerniture of 1875 has legally settled the question that the old earldom is extinct, or that the title of 1565 adjudged to the present Earl of Mar and Kellie is to be identified with the earldom on the Union Roll. We would rather not have imported Mar into the discussion ; but it is a fair reply to Mr. Hewlett that an additional argument beyond what we have already advanced against the power proposed to be given to the House to tamper with the Union Roll is, that it may be made use of by Committees of Privileges as a weapon to do what Lord Cairns deprecated, to "go beyond what the decision actually was." While we emphatically acquit the Lord Chancellor of designedly introducing these general provisions for the particular purpose alluded to, we, at the same time, think it neither impossible nor improbable that they may be used by the Committee of Privileges as a weapon for effecting a quasi-legal extinction of the old earldom, in order to rid them from the awkwardness of there being now (in consequence of their blunder of 1875) *de jure* two earldoms of Mar instead of one ; and this danger, which Scotch people in general consider far from chimerical, is certainly a strong additional argument beyond those already adduced by us against entrusting the House of Lords, or rather the Committee of Privileges, with power to alter the order of the Union Roll. Better that there should be duplicates of the title of Mar, as there are of several other titles in the peerage, than that the law Lords should add a flagrant personal wrong to the error of 1875.

We may conclude by a short quotation from an excellent and thoughtful article by a well-known member of the English bar on "The British Peerage," in the *Law Magazine and Review* for February last, as showing the direction in which public opinion is tending, and the direction in which legislation should also tend :—

"I would prefer to see the ancient jurisdiction of the Court of Session again set in motion for the determination of peerage claims in Scotland, and the adoption of a similar course before the Supreme Courts of England and Ireland. After full inquiry

by the Supreme Courts of the law, peerage claims would then properly be subjected to the right of appeal to the Judicial Committee of the House of Lords."

Legal questions should be decided by the Court where the law to be administered is best understood. If even in England a change in this direction is beginning to be wished for, how much more is it needed in Scotland!

REMARKS ON RECENT ENGLISH CASES.

Construction of Statute.—Marginal Note.—In *Sutton v. Sutton*, L. R. 22, Ch. Div. 611, which turned upon the construction of a section in an Act of Parliament, the counsel for the appellant endeavoured to aid his contention by referring to the terms of the marginal note to the section, observing, "The marginal note may now be read in aid of the interpretation of the section: *In re Venour's Settled Estates*, 2 Ch. Div. 535." To which the late Master of the Rolls replied, "The *dictum* in that case is not strictly correct." Sir George Jessel himself was the judge in that case. "I have since ascertained that the practice is so uncertain as to the marginal notes, that it cannot be laid down that they are always on the roll." In the rubric to *Sutton's* case we read, "The marginal notes to the sections of an Act of Parliament are not to be taken as part of the Act. *Dictum* in *In re Venour's Settled Estates* corrected." The reporter evidently assumed that the correction of the *dictum* was something new. It is rather remarkable that the counsel, the judge, and the reporter have all omitted to notice that this *dictum* as to the effect of marginal notes, when repeated by Sir George Jessel in the later case of *Attorney-General v. Great Eastern Railway Company*, L. R. 11, Ch. Div. 449, was unanimously and somewhat contemptuously dissented from by the Court of Appeal (Bramwell, James, Baggallay, L. JJ.). This is fully noted in an article on the Construction of Statutes in our number for September 1881 (vol. xxv., at p. 476). The *dictum* of Sir George Jessel, and its correction by the Court of Appeal, is not noted in the head-note to the report of *Attorney-General v. Great Eastern Railway Company* in the Law Reports. This just shows the necessity of reading the cases themselves. It is a mistake to suppose that the whole of the law to be found in a case is always extracted and put in the rubric or head-note. On the other hand, it is only fair to remember, in justice to the reporters, that occasionally we have a bit of law in the rubric which is not to be found in the case.

Slander—Special Damage. Natural and Probable Consequence.—The case of *Chamberlain v. Boyd* (Court of Appeal, March 19) is worth noting, not because it declares any new principle, but because

it presents a somewhat peculiar instance of the application of principles already established, one of which is not recognised by our law. The plaintiffs applied to be elected members of the Reform Club, and were black-balled. An alteration of the rules as to the mode of election, transferring it from the members of the club to a committee, was proposed, under which new mode of election the plaintiffs thought they would have a better chance of being elected than under the existing mode. It was alleged that certain words spoken of them by the defendants, to the effect that their conduct had been so bad that they had been expelled from a club in Melbourne or Sydney, had induced or contributed to induce the members not to consent to the proposed alteration, whereby it was said the plaintiffs' chance of election was diminished. Mr. Justice Field held the action relevant. The Court of Appeal (Coleridge, C. J., Brett and Bowen, L. JJ.) held that no relevant ground of action had been presented. The Court did so on two grounds: firstly, that no special damage was alleged—the damage stated being too shadowy and remote to amount to special damage; and secondly, that the alleged consequences were not the natural and probable result of the words said to be used. The law of England, unlike the law of Scotland, holds that to sustain an action for oral defamation (it is different when the defamatory words are written, or printed and published) the plaintiff must (except in three cases, viz. where an indictable offence is attributed, or the words are spoken of the plaintiff in his office or employment, or represent him as having an infectious disease) qualify some special, that is to say, pecuniary or temporal damage. Mere mental suffering, and mere injury to character, do not justify an action for slanderous words spoken. "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone; though, where a material damage occurs and is connected with it, it is impossible a jury in estimating the damage should altogether overlook the feelings of the party interested." *Per* Lord Wensleydale in *Lynch v. Knight*, 9 H. of L. 577. See also *Allsop v. Allsop*, 5 Hurl. and Nor. 534. As regards the latter remark, it reveals an utterly indefensible state of matters. Either a person is entitled to damages for wounded feelings or he is not. If he is not entitled directly, he is not entitled indirectly. It is absurd to say, and that is practically what is said, that a person is not entitled to damages for a great wrong, but he is entitled to damages for a petty injury, and when he is, he is entitled to damages for the greater injury. The rule as to special damage has been painfully exemplified in the case of imputations against the chastity of a respectable woman, which *per se* afford no ground of action. This is a blot on the English law, and has been declared to be so by many eminent judges, from Chief Justice Willes in 1759 (*Jones v. Herne*, 2 Wils. 87) to Chief Justice Cockburn in 1864 (*Roberts v. Roberts*, 33 L. J. (Q. B.) 249).

Chief Justice Cockburn observed, "The law is very cruel in preventing a woman who has been wantonly slandered from bringing an action for the purpose of vindicating her character; but as the law now stands, and which I very much regret, such an action is not maintainable." The defence of the state of the law, or apology for it, made by Mr. Justice Crompton in *Robarts'* case, is one which has been pressed into the service of every acknowledged abuse from time immemorial. "*We must draw the line somewhere.* If we held the rule about special damage did not apply to cases so cruel and disparaging as this, we should also be obliged to hold that it would not apply to a case of slight misconduct; as, for instance, the allegation that a man had sworn an oath, and that by reason of the allegation the plaintiff had suffered some very slight damage." It is no doubt necessary to draw the line somewhere, but it is equally necessary to draw it on the right side. It is absurd to say that we shall not allow any redress where the injury is great, because if we did so we should be obliged to allow redress where the damage was slight. In the latter case the proper course would be to proportion the compensation to the injury, and make it as slight as the damage sustained. In reading over the cases as to what amounts to special damage, it is impossible to avoid the idea that, animated by the feeling that the rule itself is too strict, some straining has occasionally been made to bring the case within the desired category. The loss of the society of friends is not a ground of action. But the loss of the hospitality of friends is, and "hospitality" means simply, "that persons receive another into their houses, and give him meat and drink *gratis*." *Per* Blackburn, *Davies v. Solomon*, L. R. 7 Q. B. In *Moore v. Meagher*, 1 Taunt. 39, the declaration was that certain persons named had received the plaintiff into their houses and "provided her with meat and drink to the great reduction of her expenses and increase of her riches," which she estimated at £100 a year. The jury, probably thinking that the plaintiff overrated her capacity of consumption, and taking into account the precariousness of the source of revenue, awarded her £100 in all. In *Davies v. Solomon*, the loss chiefly averred by the plaintiff was the loss of the *consortium* of her husband; but the loss of "the hospitality of divers friends" being coupled with this, the question on which there was a difference of opinion in *Lynch v. Knight*, viz. whether the loss of the husband's *consortium* alone was a ground of action, did not require to be determined, and the action was found relevant.

The rule requiring special damage being settled, any injury to the feelings or reputation of the Messrs. Chamberlain from the allegation that they had been expelled from some club in Australia was not a ground of action; and it seems vain to contend that what was alleged amounted to special damage. At most it was that the words spoken caused the retention of a mode of election, under

action is in such cases allowed against the slanderer, and also against the man who breaks his engagement, which he would be entitled to do if the imputation, say of unchastity, were true. In Smith's *Leading Cases*, ii. p. 563, it is said, perhaps the true ground on which *Vicars v. Wilcocks* may be supported is, that there was "in reason and common sense" no connection between the imputation and the damage. The use of the word "legal" has now dropped out of the statement made by the judges of the consequences required to sustain an action. In *Lynch v. Knight*, *supra*, it was alleged that in consequence of a statement about a married woman, that she had been all but seduced before her marriage, and that the man referred to ought not to be admitted into her husband's house, the husband had compelled her to leave her home and take refuge with her father. The majority of the House of Lords held the action not maintainable, the act of the husband not being the "natural and probable" consequence of the words spoken. Lord Campbell said if the slander had imputed actual adultery to the wife, and the husband believing it to be true had therefore separated from her, this separation would have been the "natural, direct, and probable consequence" of the slander; but the words did not contain any imputation which, if true, would induce any reasonable man to act as the husband was alleged to have acted. "The special damage," said Lord Cranworth, "must appear to be the natural, I do not say the necessary, consequence of the words spoken;" and he did not think the husband's conduct "was that which was, or which the slanderer could have supposed, likely to be the consequence of his slander." Lord Wensleydale dissented, thinking that the husband's conduct was in the circumstances the natural and probable consequence of the alleged calumny. His Lordship also put the principle in a larger sense than it had been stated by Lord Campbell. He adopted the statement of Judge Christian in the Court below: "The consequence must be such as, taking human nature as it is with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated and feared would follow from the speaking the words, not what would reasonably follow, or we might think ought to follow." The expression "natural and probable" consequence seems preferable to "natural and reasonable" consequence, unless we understand by "reasonable" reasonable to be anticipated, which is not the first impression at least which the term conveys.

THE JURISDICTION OF THE ENGLISH COURTS IN SCOTLAND.

THIS subject has already been dealt with in these pages in connection with the Rules of Court passed by the English judges under the

Judicature Acts, permitting service of English writs in Scotland, and the consequent hardship so often inflicted upon domiciled Scotsmen. A somewhat new phase of the question, however, is presented by a recent decision of the Court of Appeal, which seems to deserve the attention of our readers; for if it shall be affirmed on appeal to the House of Lords, the rule will then be apparently conclusively laid down that the whole estates of a deceased Scotsman may be "thrown into Chancery," as the phrase is, and instead of being dealt with in the ordinary way by his Scottish trustees or executors, may be transferred to England, and administered under the control of the English Court of Chancery, at the suit of any Englishman who may be interested in them, if only he shall happen to have left, in addition to his Scotch property, any funds or estate situated in England.

No doubt we do not now hear for the first time of such a proceeding. Something like it was done in the case of the *Bute* estates, and later in the succession to the *Stirling-Maxwell* property. But the case of *Orr Ewing*, to which we now refer, raises the conflict of jurisdictions more distinctly and sharply than has hitherto been done, and discloses a much greater case of hardship upon Scotsmen.

The facts, as most of the judges who pronounced opinions upon the case agreed, are of the simplest. Mr. John Orr Ewing, a rich manufacturer in Dumbartonshire, died on 15th April 1878, leaving a will by which he nominated six gentlemen, who all accepted office, his trustees and executors. Four of these were domiciled Scotsmen, the other two resided in England; and one of the four, being member of Parliament for the county of Dumbarton, had also a residence in England. They obtained confirmation from the Commissary Court at Dumbarton on 13th May following, and the property to which they thus acquired title amounted, according to the inventory lodged by them, to the sum of £460,549, 10s. 4d., of which £435,313, 17s. 10d. worth was situated in Scotland, and the balance of £25,235, 12s. 6d. consisted of shares in companies whose registered office was in London. In order to acquire a title to these English assets, the trustees, on 25th May, caused their confirmation to be sealed with the seal of the appropriate Probate Court in England, under the provisions of the Confirmation and Probate Act 1858, and proceeded to realize and transmit to Scotland the said English estate.

By 25th February 1880, when the summons in the action now referred to was issued, the whole estate, with the exception of some £2700 remaining invested in England, had been transferred to Scotland, and was being administered there *more Scotico* by the trustees, with the advice of their solicitors. It must strike Scotsmen, therefore, as, to say the least of it, singular, that this proceeding should be suddenly interfered with by an action raised against the trust by an Englishman in the English Courts. Mr. Ewing, how-

ever, had some nephews in England to whom he left certain provisions under his will, and one of these dying suddenly in India bequeathed to a travelling acquaintance who was with him in his last moments a legacy payable out of his interest in his uncle's estate. This gentleman, for certain reasons of his own, was not satisfied with the conduct of the Scotch trustees, or the administration of the trust in Scotland, and apparently made up his mind that his legacy would be safer, or more quickly paid, if the whole thing were transferred to England and administered by the Court of Chancery there. His claim, be it observed, was truly only against the estate of the nephew, his donor, and should accordingly have been, properly speaking, preferred against the nephew's representatives, who alone could receive payment from his uncle's trustees and grant them a discharge. But this would not have suited our hero so well. Possibly he thought he might compel payment more readily, and certainly if Mr. Orr Ewing's trustees could have foreseen the course which the litigation has taken, it would have been cheaper for them to buy him off even at his own valuation. But however this may be, he adopted a proceeding for which the best and the worst that can be said is that it is in accordance with English practice,—he sued as “next friend” of some of the testator's nephews, brothers of his deceased benefactor, for a general accounting and administration of Mr. Orr Ewing's estate in the Court of Chancery. We need not concern ourselves here with the merits of his case, further than to say generally that the allegations contained in his statement of claim, the document which in English practice seems to correspond to our condescendence, disclosed a case of *devastavit*, or, as we should say, maladministration on the part of the trustees, against whom he sought the aid of the Court of Chancery. But the question we are now concerned with, and which alone has been the subject of investigation and decision by the English Court, is the jurisdiction of that Court to entertain his suit. The trustees, of course, objected *in limine* to the interference of a foreign tribunal. Those of them who resided in Scotland had been served with the summons on an order to serve outwith the jurisdiction, obtainable as a matter of course under the Rules of Court framed by the English judges in accordance with the provisions of the English Judicature Act 1875, and they entered appearance to defend the action. It appears that according to English practice they should have done so under protest, if they meant to contest the validity of the service, and the fact that they did so *simpliciter* was the first point made against them. This omission, however, whether intentional or not, has little bearing upon the question, for it was merely a step, and an unimportant one, in the chain of reasoning by which the English Court has ultimately sustained its jurisdiction. In their statement of defence the trustees distinctly challenged the jurisdiction of the Court; nor could they probably have objected

to the service with any hope of success, for as these rules now stand, the English Courts, and specially the Court of Chancery, have uniformly assumed their power to serve on a defender resident beyond their jurisdiction, for the purpose of enabling them to do justice between parties residing or suing within it. To a certain extent, also, and for certain purposes, the trustees, as possessors of property within the jurisdiction of the Court, were amenable to its orders, and could, it may be admitted, be fairly enough sued to account for the sum of £2700 still at that time situated in England. That is to say, that as personal representatives of the testator in England, they were responsible to English suitors for the amount of his estates then under the jurisdiction of the English Courts. But they objected, and apparently with reason, to being dragged before the English Courts in a different capacity altogether, viz. as personal representatives of the testator in Scotland, and amenable to Scottish suitors and the Scottish Courts for the amount of his estate in that country. Mr. Justice Manisty, who decided the case in the first instance, while he considered the Court had jurisdiction over the whole estates of the testator, did not think it expedient to make an order to transfer the whole property from Scotland to England. By the time the case came before him, even the residue of £2700 had been transferred to Scotland, and there was no allegation that this had been improperly done, or that the defendants ought to be ordered to bring it back. "If it was brought back," said the judge, "what would be the result of any inquiry which I could make? There would be a great deal of cost, a very costly and probably lengthy inquiry as to what the assets consisted of in Scotland, and I presume it would result in showing that there were no debts to be paid here, and that, subject to the question of costs, the proper thing would be not to keep that here as a mere, I was going to say almost, inappreciable amount for the purpose of administration. . . . I can't conceive anything more disastrous than such an inquiry, merely to see how far the plaintiff's interest in that small sum ought to be protected. *For that is all over which this Court has any jurisdiction with regard to distribution*, though it may have had jurisdiction to inquire what the whole consisted of, with a view to protecting the plaintiff's interest in this small sum." The last sentence repeats a statement of the law with which the learned judge opened, and which is apparently not only correct, but sensible, to the effect that "the general principle of the law of England in Chancery jurisdiction is, beyond controversy, that, except for the purpose of protecting the interest of creditors, beneficiaries, or persons interested in the estate, so far as this Court can do it with regard to assets which are within the jurisdiction, it will not administer the other assets which are in the country of the domicile."

Now, so far, the jurisdiction claimed by the Court of Chancery

seems fair enough. A distinction is drawn, it will be observed, between a mere inquiry and an order for general administration. A Court is always bound to give its aid to parties requiring it, within the limits of its jurisdiction; and if to do justice between two or more claimants on a fund within its control any inquiry is necessary, there can be nothing urged against that. Again, if the fund be partly within and partly without its jurisdiction, a statement of the whole fund may be necessary to enable it to decide between competing claimants, and to give them a title by way of decree which will be recognised and enforced by the Courts under whose jurisdiction the remainder of the fund may be situated. And no conflict of jurisdictions would be raised thereby. But if one of the Courts assumes a power not only to inquire into the claims of its own litigants, and to decide their rights, but also to enforce these rights within the jurisdiction of the other, there is at once an end of the comity of Courts. If Mr. Justice Manisty is right, and we submit he is, in his statement of the purpose for which, and the extent to which, the English Court can and should grant an order for inquiry in administrative suits, then his judgment is right in its result, for the inexpediency of granting such an order in the present case is perfectly self-evident.

But Mr. Justice Manisty's judgment, consistent as it is with the principles of international law and comity, and with the obvious equity of the case, was entirely negatived by the Court of Appeal, and it remains to be seen how the *ratio decidendi* of that Court will stand impartial consideration. The Master of the Rolls, who delivered the leading opinion, began by remarking that the defendants had foreclosed any objection to the jurisdiction by entering appearance without protest. He based the jurisdiction of the Court upon the consideration, that persons within its jurisdiction liable to pay or give security for certain sums, and others liable along with them, had appeared without objection, although they were served outwith the jurisdiction of the Court, and could have moved to set aside the order for service. Now these orders and services have been till now merely a common law nuisance, and have not hitherto been used in Chancery, at least to any great extent. No doubt, since the consolidation of the English Courts, they are technically applicable to all the divisions of the High Court of Justice. But the Court of Chancery has all along assumed jurisdiction in the cases and for the purposes indicated by Mr. Justice Manisty, and, in its new form of the Chancery Division of the Court, has not apparently hitherto required the use of the Rules and Orders. Even if the defendants therefore had done as the Master of the Rolls said they should, objected to the order for service, and got it discharged, the question of jurisdiction would still have remained open, as the Court of Chancery would undoubtedly have sustained its own competency to call before it trustees and executors under a will recorded in England. How, then, can they

be said to have admitted the jurisdiction, when they appeared expressly to contest it, as they did in their defences? Had this been an action at common law, they would have been in the same position as the defendants in the case of *White v. M'Gregor & Son*, reported in our pages in the month of December last, where such a plea, although given effect to by Mr. Justice Day, was unhesitatingly rejected by Justices Field and Stephen in the Court of Appeal. And most justly too, for how can a defendant possibly object to the jurisdiction of a Court except by entering appearance for the purpose of doing so? To the extent which, we have said, Mr. Justice Manisty laid down as the general principle of English law in Chancery jurisdiction, and to the effect we have explained, the defendants did not deny that, being the personal representatives of the testator in England, they were liable to account to the English Court at the instance of an English suitor for the amount of the assets situated within the jurisdiction. But that liability did not depend upon the service in Scotland, and could not be affected by it one way or another. The opinion of the Master of the Rolls, of course, shows that this is not the view taken by the English Courts, and it exposes in a very striking manner the dangers to which we in Scotland are now exposed at the hands of English judges. The rules, it is said, enable service to be made anywhere with leave of the Court, and a defendant *must appear* and object to the order for service, otherwise he will be barred from afterwards objecting to the jurisdiction. And to that jurisdiction he is subject in its fullest extent. By taking advantage of these common law rules, therefore, the Court of Chancery has obviously very much extended its jurisdiction. For the argument against the trustees was that, having appeared unconditionally, they were subject to the jurisdiction of the Court for all purposes; not merely, as formerly in Chancery practice, to the effect of granting relief between parties in England and administering funds there, but of subjecting them, as possessors of the testator's moveable estate, to account for it fully wherever situated. There is thus quite a new element introduced into the reasons for granting a general order for administration. In previous cases, such as *Stirling-Maxwell v. Cartwright*, when such an order was granted, one of the executors was a party to the English proceedings, so that the Court had there, so to speak, a personal jurisdiction as well as a real one over funds within its territory. But in this case the Court has created that personal element by means of the rules in question, and the service under them, so as to avoid the argument against their jurisdiction based upon the previous theory of Chancery jurisdiction. The gross injustice of this surely only requires to be stated in order to be appreciated. Living Scotsmen have been long enough pestered with these rules. Amendment of them has been promised, and yet the nuisance, instead of diminishing, is apparently now beginning to affect the

dead. Surely this is an unwarrantable application of the maxim, *Boni judicis est ampliare jurisdictionem*.

It is difficult to say which of the grounds of jurisdiction stated by the two Courts which heard the case is less satisfactory. The Court of Appeal went upon what, for the sake of distinction, we may call the personal ground—the bodily presence, so to speak, of the trustees before it. Now, in the first place, that is an entirely new and quite unreasonable basis of such a jurisdiction as the Court of Chancery claims to exercise in cases like the present. Till now the theory has been as laid down by Mr. Justice Manisty in the Court below—power to do justice between litigants within the territory, and to administer and distribute assets also within it. That is the foundation and object of this branch of Chancery proceedings. But, in the second place, the trustees are, after all, only present in a representative capacity—that is, as personal representatives of the testator in England and possessors of his assets there. The Master of the Rolls says no, they also represent the testator in Scotland, and are served and have appeared as personal representatives in Scotland, and holders of the assets there. This, however, is not so, for the service is at the discretion of the judge, and the permitting of the suit to go on or not is at his discretion also, two facts which the Master of the Rolls expressly negatived in his judgment. He cannot, however, adopt the service under the well-known Rule 1a. of Order XI. for any purpose, without at the same time admitting the discretion of the judge; and yet his judgment proceeded much upon the reiterated statement that the Court could not refuse to exercise its jurisdiction, and make the order for administration sought. But for the service, however, he would admittedly only have the English personal representatives before him, and, taking advantage of the service in Scotland, we have seen he must admit also the discretion of the judge, in which case it obviously appears that Mr. Justice Manisty exercised that discretion wisely.

But that judge also claimed jurisdiction for the Court on what may be called the *real* ground—the existence within its territory of assets for distribution at the time the suit was brought. He did not make any order, thinking it not expedient to do so; and if he had, it would, if one can judge from his remarks, have been limited to the amount of that fund. If so, probably no objection could have been taken. The law laid down in the case of *Preston v. Melville*, 29th March 1841, 8 U. and F. 1, that “the law of the domicile of a deceased person governs the succession to his personal estate, wherever situated; but *the estate itself must be administered in the country in which possession of it is taken under lawful authority*,” is sufficiently well settled, and appears equitable. The result of the Master of the Rolls’ judgment, however, is directly the contrary. Even granting the correctness of his argument, the result is a direct conflict with the above well-known principle of

private international law. The only apology he offers is a sneer at the independence of the Scottish Courts. Scotland, he says, is not a foreign country even in the eye of the law. Probably no other lawyer in the United Kingdom agrees with him in this, and it is too obviously false to require contradiction. But he condescends to admit that the Scottish Courts, though subject to the English, are entitled to a measure of respect; and if a suit had been going on in them against the trustees, he would not have allowed them to be "doubly vexed" by proceedings in England. But what necessity is there for a suit in Scotland? We have no such thing as Chancery administration, for which we cannot be too thankful; and the trustees were doing their duty in the usual way here, so that no one thought of suing them. The truth is, moreover, that a trust or executry in Scotland is really an administration suit without the expense and delay of Court procedure. The trustees place the funds in Court by means of an inventory, and by confirmation acquire their title to administer and divide them. They are truly officers of Court, just as a trustee in bankruptcy or a judicial factor is; they find caution for their dealings, and they in ancient times required a formal discharge from the Commissary, though that has for long been dispensed with now. Can they then transfer funds from the jurisdiction of the Scottish to that of the English Courts? Could they not be interdicted from doing so? At all events, are not the Scottish Courts entitled to so much consideration at the hands of English judges as to make it worth while to try? The only thing which will make the Master of the Rolls relax his grip of the Scottish assets is a counter proceeding in the Scottish Courts. And nobody wants to sue the trustees. They can't sue themselves or one another, and they have no Court of Chancery in which they might take refuge, and into which they might "throw" the estate for safety. Truly theirs is a hard case. The cheapness and efficiency of our mode of administering a deceased person's estate is a reproach to it in England. If we had a costly and absurd procedure, such as Mr. Justice Manisty describes, it would be respected in the English Courts, presumably it would be understood and sympathized with. But because we have not, English solicitors and "next friends" swoop down upon any large estate in Scotland, as they wanted to do in the matter of the City of Glasgow Bank litigation, in order to bring grist to their cumbrous and expensive mill. It is devoutly to be hoped that this sort of thing will be soon put a stop to, and in the present case that a vigorous argument will put the matter so before the House of Lords on appeal that the independence of Scottish tribunals and of Scottish men, dead and alive, of all foreign, and especially of English, jurisdiction may be fully vindicated.

THE COURT OF SESSION IN 1819-20.

(BY A PARLIAMENT HOUSE CLERK OF THAT PERIOD.)

THE two Divisions of the Inner House were held—the *First* Division in an apartment on the left of the Outer House ; and the *Second* on the right side, in what is now the Law Room. The Outer House was as it still remains, but no portraits then adorned its walls. The large window had a rude representation of the figure of Justice, blind-folded, with ponderous scales in her hands, which was jocularly said to represent an old woman in a market retailing sugar-candy. In the First Division, Charles Hope presided as Lord President. In the early mornings of spring and summer he was to be seen in uniform and on horseback, on the green of Heriot's Hospital, in command of the Edinburgh Volunteers, the rank and file of which was chiefly composed of the legal profession. During the Radical rising in the west of Scotland, the regular troops were removed from Edinburgh Castle, and the Edinburgh Volunteers garrisoned the fortress for some time. Many racy anecdotes were told of this epoch in their military life. The President had a very clear and authoritative voice. Underneath the bench sat Walter Scott, generally occupied in correcting proofs of print, when yet he was the "great unknown." In the Second Division the chair was filled by Robert Boyle, Justice-Clerk ; close above him was the statue of Forbes of Culloden, now placed in the Outer House. His Lordship, from the opening to the close of the sitting, whilst the advocates were pleading, was studiously writing in a large volume. When he spoke, he did so very vehemently, and being a man of a large corporation, threw himself into muscular contortions. The statue of Forbes had an outstretched arm, the palm of the hand reached close over his Lordship's cranium, and it was a jocular saying that the marble bust appeared as alive and uttering the word "*whisht*." Lord Glenlee was considered the best lawyer on the bench of the Second Division, and gave his opinions at great length ; but the reporters complained that he was difficult to follow. He had a habit of rolling and unrolling a piece of string or tape around one of his fingers, which the wags of the day called the "thread of his discourse." It really appeared to be so, for whenever the string slipped and fell on the floor, his Lordship went in search of the ligature, and only recommenced his oration when the stray string was captured and again put in position. Lord Robertson (the first), considered the best teind lawyer of the age, was very deaf and had a large hearing trumpet, and often sat at the clerk's table that he might better hear the pleadings. In the Outer House, two niches with bars were placed in the east wall, where two of the permanent Lord Ordinaries in rotation heard, or were supposed to hear, their rolls of motions and debates. The noise of the multitudinous throng which then assembled and walked the floor,

obstructed all hearing. The Parliament House was at that time the rendezvous for all friendly meetings, and the circle of legalists of all ranks. Country cousins were taken to see the show. A legal crowd surrounded the fireplace called the "stove school," and when Sir Walter Scott, Peter Robertson, Duncan M'Neill, Douglas Cheap, John Wilson, and other rising wits joined the circle, loud laughter ever and anon rose to the groined rafters. It was not unusual to see the judge on the wall recognize some friend in the passing tide of faces, and give a familiar nod of recognition to him. A cloud of dust hung overhead and shrouded the throng below. A low and shabby pulpit or box stood at the north end,¹ occupied by the "crier" or "caller." His aid was incessantly evoked to call some one from the tumultuous wave of passing humanity. Sometime to astonish a country friend, he was desired to call for him by name, when the person called was standing close by his side. The crier did so with stentorian voice, and the friend stood trembling, thinking he was "*wanted*," because of some great unknown infraction of legal propriety. A large jug and tumbler stood on the ledge of the box, charitably supposed to be simply filled with pure water. He received a sessional gift from the profession; but it was said that the work was so severe and incessant, that a couple of sessions were sufficient to wear out the best of tarpaulian lungs, and the office was thus frequently vacant and again filled. The new system of having four permanent Ordinaries was much complained of by the patriarchs of the profession. Previously, before the division of the Court in 1806, all the *fifteen* judges in rotation served in the Outer House as Ordinaries. Thus there was a greater choice of judges, and more despatch, as sometimes a favourite permanent Ordinary (such as Lord Pitmilley) had his roll so crowded that it was frequently six months before he overtook a case. The judges who had cases on their roll before the division of the Court, on certain mornings came into the Outer House with some half dozen of cases which were still attached to their names. Lord Bannatyne had one such case, one of the litigants in which rejoiced in the name of *Lamb*, and the case was known as his "*pet lamb*," though being now of the mature age of nearly a score of years, it must have passed the age of ewehood. A large bench and bar stood at the south end of the large hall, which in ancient days was occupied by the "*Ordinary for the week*." On two days in the week the new cases or summonses were called from that bar. The advocates' first clerks attended and entered appearance for defenders in their masters' names. The cases on the rolls were called by the macers, who generally were old men and had been formerly in the private service of the judges. They had loud and commanding voices, but amidst the turbulence of the throng, the name of the advocate called was often very indistinctly heard, and frequent mistakes were thus innocently made. One respected and much

¹ This has only been removed within the last ten years.

employed counsel was then in extensive practice. His name was Mr. Small Keir, and when uttered "*Small Keir*," it sounded uncommonly like "*small beer*," and often astonished strangers, as if such inferior beverage had found its way into such high places. The verdant stranger was in expectation that the next utterance might be "*sold here*," and the couplet thus made complete. The depute or assistant clerks were then termed "*closet keepers*." They were generally old men, and somewhat sternly peremptory, not to say rude. They often used much familiarity with the Lord Ordinaries. They made it to be understood that they alone knew the forms of process. On one occasion the Lord Ordinary proposed to make avizandum with a process, but the depute responded, "Your Lordship might as well make avizandum with a pair of my auld beets" (boots). The closets or dens in the Register Office were opened in the evenings, when processes were lodged and borrowed. On one occasion a dandy young man, who chopped the finest of English, of which the depute was wholly guileless, remonstrated that the process was his to borrow, but that it had been improperly given to the "other party," which he again and again reiterated; whereon the churly official, irritated at being thus found fault with in his own territory, and the oft-repeated challenge of the "*other party*" ringing in his ear with anglified accent, gruffly replied, "What is it, young man, to you, though I had given your process to '*Bonaparty*'?" About this time a great revolution in the arrangement of process was introduced, either by Act of Sederunt or order of Court. The pleadings were previously in all sizes and shapes, and held together by all manner of bandages. It was henceforth ordered that the papers should be written or printed on foolscap, and only tied with red tape. This gave occasion for much grumbling amongst those who were ultra-Conservative and did not wish to be disturbed in their olden ways, however inconvenient. The order got the name of the "*red tape order*," or the "*fool's-cape*." A porter was generally attached to agents' offices, who carried the process to and from the Register Office. These porters had the name of "chairmen," because once they were the bearers of the ancient sedan chairs, before the age of cabs, broughams, hansom, and other modern vehicles. It was a singular fact that almost all these chairmen were Highlanders, and chiefly natives of Inverness-shire. In agents' accounts a frequent item was "*chairman* 6d.," or sometimes a general sessional charge of £1 or 10s. for chairmen.¹

The father of the practising bar was John Clerk, who was lame, and hence was permitted to address the Court seated, his limbs enveloped in flannels. Many are the anecdotes told of this eminent and witty lawyer, who spoke in the broadest doric. He was only equalled in that respect by Lord Balmuto. There is the oft-repeated story of the case of a captain who was prosecuted by a damsel for breach of promise of marriage. John, who was

¹ The term is still used instead of "messenger" in some old-fashioned offices.

counsel for the lady, in his address repeatedly referred to the defender as "*the sodger*." The son of Mars at length solicited the protection of the bench or judge, claiming that he was *an officer* and not *a soldier*. John coolly and sarcastically remarked that "this man, who admitted he was only an *officer*, frankly confessed that he was '*nae sodger*.'" A young advocate appeared on the floor of the House whose name was Graham, a son of the author of the poem, *The Sabbath*. He was about six feet in height, and so lean as to have acquired the name of the "walking skeleton." John, seeing him in the house, inquired of a friend, "Who is that tall man?" He received for an answer, "Oh, that is the 'Son of the *Sabbath*.'" "Indeed," says John Clerk, "he appeared to me to be much more like the son of the '*Fast-day*.'" Mr. Allan Maconochie, afterwards Lord Meadowbank (the second of the name on the bench), was a favourite of Clerk's, though an opponent in politics. On receiving his appointment he waited on the aged counsel, and consulted with him as to the title he should assume on the bench. He said his judgments might be confounded with his father's, who was known under the same title. Clerk at once replied there would be no difficulty, as the public would, on hearing of the appointment, unanimously and at once affix his title by exclaiming, "*The Lord preserve us!*" The young gentleman endeavoured to assuage the ire of his ancient friend by the question, "I am sure, John, that they might have got a *worse* than I to be judge." The reply was in Scotch fashion, by putting another emphatic question in deep tone, "*Whaur?*" The friend advised the adoption of his father's judgeship title, remarking that he would be *Meadowbank*, but good-naturedly "*also*" but not "*like wise*." It is right to record that the second Meadowbank on the bench fully justified the wisdom of the appointment. John Clerk received a judgeship, but it was much too long protracted, and the celebrity which he attained at the bar was not in his old age carried to the bench. He assumed the title of Lord "*Eldin*," from a landed inheritance he possessed. When it was remarked that he had stolen the title of the great Chancellor *Eldon*, he was wont to reply that the difference was only in the "*i*" (eye). Mr. Clerk was a great admirer of art and an ardent collector of pictures. His dwelling at Picardy Place was a perfect museum of art. At the sale of his pictures after his decease, so great was the assemblage that the floor gave way from the pressure, and many were severely injured, and a respected citizen (Mr. David Smith) was killed. Mr. Clerk paid a very extravagant sum for a picture said to be directly from the *easel* of Titian. It formed the principal object of attraction in the dining-room at Picardy Place. All the other pictures were so arranged as to bring out this chief picture. Lord Meadowbank, who was also a lover and patron of the fine arts, always alleged that Mr. Clerk had been cheated in the purchase of the picture at such a high price—that

his was merely a copy, and that he had seen the original in the collection of some nobleman, but he had forgot the mansion. It came to pass that in after years an exhibition of pictures of the *old masters* took place in Edinburgh. The original picture there appeared and was detected by Meadowbank, who took his friend Clerk and brought him before the true picture and left him there in a state of bewilderment. Clerk returned to his house and rearranged the remaining pictures, displacing his coveted picture from its place of eminence. Next morning his maiden and aged sister, who was his housekeeper, discovered the revolution on the wall, and wildly exclaimed: "O John! John! something has happened which will assuredly break your heart." Her brother coolly replied, "What, Janet, has happened?" The sister mournfully replied, "Titian is away! Somebody has stolen Titian." John Clerk most philosophically finished the colloquy and his breakfast by the remark, "Never mind, Janet, *Titian is not the chap we took him for.*" No more was said as to the mishap, but the joke was kept up for long among his friends, who noted the void in the gallery, but carefully abstained from any reference to its cause. Lord Alloway (David Cathcart), whose mirth-provoking countenance, together with his judicial title, obtained for him the cognomen of "*Tam o' Shanter*," was an Inner House judge of the First Division. Clerk, in a case involving some nice questions of feudal law, had made a lengthy speech. One judge delivered an opinion in favour of the views taken by Mr. Clerk. Lord Alloway followed with strongly adverse remarks against the opinions expressed by the advocate. As soon after Lord Alloway had commenced, Mr. Clerk rose from his seat and departed, exclaiming, "Lord, *A'l awa*,"—*Anglicé*, "*Lord, I'll away.*"

The Lords Ordinary were in use to give no opinions with their interlocutors, which were quite oracular, "*Decern*" or "*Assoilzie*." In some cases, however, there were several "*In respects*." In one case, where Lord Bannatyne was Ordinary, the "*respects*" were so numerous, conflicting, and contradictory, that it became an inextricable mystery. The case was as to the soundness of a horse said to be labouring under "*click spavin*." These words occurred so often that at length it came to this that "*click spavin*" was *not* "*click spavin*." This interlocutor, together with the celebrated *Bettle* case—where the judges of the First Division were admirably caricatured by Cockburn or Cranston—were circulated. Copies of the *Bettle* case are still to be found. But it is doubtful if any copy of the *Click Spavin* case is extant. Lord Cringletie (who long presided as Judge Admiral as John Wolf Murray) was the first who introduced the *note* system. Hence he was known long as the "*noted* Lord Cringletie." There was the well-known epigram, often fathered on Lord Jeffrey:

"Cringletie and necessity
Tally to a tittle;
Necessity has nae law,
And Cringletie as little."

But such were very much misapplied to his Lordship. No judge more patiently and assiduously applied himself to his cases both in the fact and in the law than Lord Cringletie. An instance may be given. A long-depending and intricate case stood on his lordship's roll, descending from some former judge. It was permitted often to fall asleep by lapse of year and day, but as often was it aroused from slumber by summons of awakening. On one such occasion the bulky process was sent to his lordship with the interlocutor written out and ready for his subscription, "Wakens the cause and orders the case to the roll." Not content with the simple signature to the prepared interlocutor, his Lordship had read the huge process. His love of notes was as powerful as the lady who, when told that she had never written her friend a letter without a postscript, at length wrote one letter with the usual "*P.S.*—You will perceive that it is possible for me to write you a letter without a *P.S.*" So his Lordship, having perused the bulky process, appended a note to the following effect:—"The Lord Ordinary having carefully read the process, recommends the pursuer to study the olden maxim, '*Let sleeping dogs lie*' (rest)." The wise hint was taken, and no more wakenings afterwards were ever heard of.

Mathew Ross, Dean of Faculty, was then considered the best entail lawyer, Walker Baird the best feudalist, Robert Jamieson the best mercantile lawyer. He was son of Dr. Jamieson, the author of the *Scottish Dictionary*, and thus often himself passed under the name of *The Dictionary*. Joseph Bell was consulted in all legal matters.

At that time it was not uncommon for Glasgow practitioners to take coach in the morning to have a consultation on some knotty point with Mr. Bell in the evening. The request was made through another agent by a letter enclosing a guinea or a couple. The day and hour were fixed, the case was verbally stated and the opinion orally given at once, and the Glasgow agent returned by the late coach with the oracular response recorded on his brain.

In these days none wore wigs save the judges, the Lord Advocate, Solicitor-General, and Dean of Faculty. Two young advocates, who, being always seen together, were hence termed the twins or the Gemini, were foremost in bringing in the innovation. The one was Robert Thomson (or Bobbie), the learned author of the *Treatise on Bills*, and Robert Hunter, the author of *Landlord and Tenant*. The former got for his wig the name of his "indorsation," the latter "his *tack*." On the proclamation of George IV. the advocates proceeded with wigs and gowns from the Parliament House to the balcony of the Exchange to witness the proclamation. Francis Jeffrey had got the wig of a large man, which enveloped his head and blinded his eyes. From this time the reign of the wigs became triumphant.

NESTOR.

The Month.

Can a Man have a Husband?—We have all heard of a ship's husband, and there is no impropriety in this, seeing that a ship is a female, and is always spoken of as "she." But it is rather startling to hear of a person of the male sex having a husband. The draftsman of the recent Explosive Substances Act evidently thinks he may. Section 4 enacts that "in any proceeding against any person for a crime under this section, such person, and *his wife or husband*, as the case may be, may, if such person thinks fit, be called and sworn." The Act was passed in great haste, but there was quite time enough to avoid such slovenly slips as this. In every morning's newspaper we read paragraphs and leaders written in much less time than was taken to pass this measure, and subjected to far fewer scrutinizing eyes than it was before being issued to the public, but we do not find anything written in this slipshod style. Continually we come across patent and palpable inaccuracies of a similar kind in Acts of Parliament. When the Newspaper Registration Bill of 1881 came to the House of Lords, at the latest possible period of the session, Lord Redesdale entered a formal protest against the manner in which the measure was hurried through that House, and declined to consider it, there being really no time to do so. It would have been well that somebody should have looked over the Bill before it became an Act. The Act is dated 24th August 1881, and it enacts that newspapers shall be registered on or before the 1st of July of that year.

As to this slip in the Explosive Substances Act, the *Law Times* of April 21 says: "We agree that the phraseology of the subsection is far from happy, but we cannot but think that looking to Lord Brougham's Act (13 Vict. c. 21) there is good ground for saying that it is technically correct." Section 4 of that Act provides that in all Acts words importing the masculine gender shall be deemed and taken to include females unless the contrary as to gender is expressly provided. The *Law Times* infers that "his" in the new Act shall include "her." This interpreting Act itself requires, and has received, interpretation. There are many cases in which it would make nonsense of the Act to read "man" as including "woman." In *Chorlton v. Lings*, L. R. 4 C. P. 374, it was held that the word "man," in the Representation of the People Act of 1867, did not include women, and in that Act there is no express provision to that effect.

Without the aid of Lord Brougham's Act it seems to us clear enough that the husband of a woman accused under the Explosive Substances Act could be called as a witness. What was intended by the words "such person and his wife or husband as the case

may be" is clear enough. The omission of the word "her" is a mere clerical error which is to be disregarded. An error in punctuation, it has been held, is not of importance, if from the context the true meaning is clear; and the words are consequently to be read as if they had been correctly punctuated. In 13 Geo. III. c. 21, sec. 3, the words occur, "aliens, duties, customs, and impositions," which made nonsense. The Court ordered the comma after "aliens" to be sent up aloft, and so the words read, "aliens' duties, customs, and impositions."

Operation and Effect of the Law Agents Act.—Soon after the passing of the Law Agents Act, a considerable number of persons were admitted as law agents, under the 24th section, which provided that any notary public who had, during the period of seven years, regularly taken out a notary's stamped certificate, and been engaged in actual practice as a law agent or conveyancer as well as a notary public, might at any time within one year after the passing of the Act be admitted as a law agent, without having served an apprenticeship, and without being subjected to examination. The persons thus admitted were generally highly respectable practitioners, who for various reasons had omitted to qualify themselves for admission to the Supreme or the Inferior Courts.

Not very many practitioners in the Sheriff Courts have taken advantage of the provisions of the Act entitling them to practise in the Court of Session, on payment of the additional stamp duty, probably for the reason that no law agent is entitled to borrow a process depending before any Supreme Court sitting in Edinburgh unless he has a place of business in Edinburgh or Leith. But the provisions referred to, together with those legalizing the division of fees between town agents and country agents, have given country agents a greater interest in, and control over, litigation in the Supreme Courts than was formerly the case.

The Act has very materially raised the standard of legal education in Scotland. Under its provisions various Acts of Sederunt have been passed, appointing examiners and regulating the examinations of apprentices. The Court have, however, accepted the examinations held by the Society of Writers to the Signet as equivalent to those held under the Act, so that there are practically two systems of examination applicable to law agents in Scotland.

Taking advantage of the provisions of the Act authorizing them to admit members on such terms as they see fit, almost all the societies of law agents have relaxed their regulations as to the qualifications for admission, apprenticeship to a member being no longer indispensable, except in the case of the Society of Writers to the Signet and the Society of Solicitors-at-Law.

The Act having, however, rendered it unnecessary for any law agent to become a member of any society, there has been a distinct falling off in the membership of all the societies in both town and country, except in the case of the Faculty of Procurators in

Glasgow, the Faculty of Procurators and Solicitors in Dundee, the Society of Solicitors of Banffshire, and the Faculty of Procurators for the Rhinns of Galloway, in each of which there has been a slight increase. There are at present (15th March 1883) 2350 enrolled law agents, of whom very nearly 1700 are members of one or other of the various societies referred to.

Appointments.—J. COMRIE THOMSON, Esq., advocate, at present one of the Sheriff-Substitutes at Aberdeen, has been appointed Sheriff of Ayrshire, in succession to the late Mr. N. C. Campbell. Mr. Thomson was called to the bar in 1861, and has been in Aberdeen for the last seventeen years.

W. A. BROWN, Esq., advocate, succeeds Mr. Thomson as Sheriff-Substitute of Aberdeen. Mr. Brown was called to the bar in 1859, and was editor of the *Poor Law Magazine* for several years. About six years ago he accepted the post of Procurator-Fiscal of Lanarkshire at Glasgow, the arduous duties of which he has discharged with tact and ability.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF ABERDEEN, KINCARDINE, AND BANFF.

Sheriff SCOTT-MONCRIEFF.

BANFF SMALL DEBT RECOVERY COURT.

M.P., PATERSON AND COMPANY v. MACKENZIE AND OTHERS.

Compensation—Concursus debiti et crediti.—Circumstances in which *held* that a company against whom arrestments has been used at the instance of servants of their employees, were entitled to set off advances made by the individual members of the company to their employees as extinguishing the debt due by the company to them, and consequently leaving no fund available to the arresters. The facts of this case are stated in the following interlocutor and note:—

“*March 20, 1883.*—Having heard parties’ procurators and made *avizandum* with the evidence adduced and whole process, Finds that during the herring fishing season of 1882, the common debtors James Thom and Alexander Innes fished, under an engagement, for the nominal raisers James Paterson & Co., Portsoy, and delivered fish to them of the value of £45, 6s. 6d.; that the claimants and real raisers were hired men in the employment of the common debtors, and assisted as such in procuring said fish; that their wages are unpaid, and that they hold decrees against the common debtors for the amount of said wages, upon which arrestments have been used against the nominal raisers and actions of furthcoming brought. Finds that prior to and during said fishing season there was advanced to the common debtors by the nominal raisers Paterson & Co., or by the individual members of that firm James Paterson and William Sutherland, goods and money to the amount of £61, 11s. 9d.; that said advances, which are of date prior to the said arrestments, were made on the faith of the said fishing engagement. Finds in point of law, that in a question of compensation it is quite immaterial whether these advances were made by the Company or by the individual partners thereof, a company being entitled when sued for a debt due by the firm to plead compensation on private debts due by the creditor to its partners. Finds in respect of said advances, that there was at the date of the claimants’ arrestments no sum due

to Messrs. Thom and Innes in the hands of the arrestees, and consequently no fund upon which the claimants as creditors of the said Messrs. Thom and Innes can claim. Therefore sustains the plea stated for the nominal raisers and arrestees, and assoilzies. Finds the claimants liable in the sum of _____ of expenses, and decerns against them and in favour of the nominal raisers and arrestees for said amount.

“*Note.*—This action raises a point of great interest to fishermen, and it is impossible not to sympathize with the unfortunate claimants who have suffered serious loss. Their case was presented to me with much ability and ingenuity, and every conceivable argument urged on their behalf. But I have had very little hesitation in arriving at the conclusion given effect to in the above interlocutor. The only question suggested by the evidence about which there could be any difficulty, related to the precise source from which these advances to the common debtors came. The individual members of the firm of Paterson & Co. were engaged at the same time in different lines of business, and as Paterson & Co. they did not keep a complete set of books. Mr. Paterson is a general merchant, Mr. Sutherland deals in groceries and nets. The common debtors stood in need of various things—of money, coals for their boat, nets, and other fishing materials; and they seem to have got them at one time from Paterson and at another from Sutherland, each entering the particular advance in his own books. I have little doubt, however, that these advances must be viewed as made by Paterson & Co., and in connection with this fishing engagement, although against that there was urged the claimants' principal argument. It was said that while the book of the fishing company disclosed a sum of upwards of £45 due to the common debtors, Thom and Innes, for fish caught, and at the date of the arrestment unapplied by Paterson & Co. in any way, it exhibited no evidence of cash or advances of any sort which could form a contra account; that the fishcuring firm had in point of fact made no such advances, whatever its individual partners may have done. In the view which I take of the law, it is, however, quite unnecessary to decide the point whether or not these advances were made by Messrs. Paterson and Sutherland as individuals, or as trading under the name of Paterson & Co. A number of decisions, commencing with that of *Bogle's Creditors v. Ballantyne*, 1793, M. 2581, quite justify my learned friend the Sheriff of Lanarkshire in thus laying down the law—‘When a company is sued for a debt due by the firm, it may plead compensation upon a private debt due by the creditor to one of its partners, and that without any assignation from such partner’ (Law of Partnership, vol. i. 421).

“This legal doctrine at once sweeps away the claimants' argument founded upon the source of these advances. It must be perfectly clear that if Thom and Innes had come to Paterson & Co. and asked payment of this sum of £45, 6s. 6d., the price of their fish, both Paterson and Sutherland could have pleaded the debts due to them even in their individual capacity. In the same way, if Paterson and Sutherland sue Thom and Innes for the money or goods which either has advanced to them, he must give credit for this sum of £45, 6s. 6d. due by the Company.

“It follows that as the debt due to Paterson and Sutherland by Thom and Innes, whether the former are viewed as a company or as individuals, exceeds in amount what is due to Thom and Innes for fish, the latter are not the creditors but the debtors of Paterson & Co. If so, where is the fund upon which the creditors of Thom and Innes can rank? It is already exhausted. Thom and Innes have got what was due to them, and more than was due to them. Their hired men, the unfortunate claimants, have, it is true, never been paid. But Paterson & Co. were not their employers, and are not liable for their wages except in so far as they have in their hands money belonging to those who did employ them.

“It seems to me very clear that creditors cannot in such a case be in a better position than their own debtors. If there is nothing for him to get, how can there be anything for them to recover? But the question has been already decided in an action at the instance of creditors. The case of *James v. Downie*,

Nov. 15, 1836, 15 Shaw 12, is instructive. There, John Gilchrist had granted a disposition of certain machinery in favour of Alexander Downie. This disposition was *ex facie* absolute, but Downie granted a back bond from which it appeared that he held the machinery in security for advances made and to be made, with a right of redemption on the part of Gilchrist. Downie afterwards became the partner of a firm of Alexander and John Downie, who made trade advances to Gilchrist. They then sold the machinery and proposed to apply its price in repayment of these advances. But certain creditors of Gilchrist used arrestment in the hands of the company and its individual partners, and brought, as we have here brought, a claim of furthcoming, maintaining that the disposition conferred a qualified right in favour of Alexander Downie alone, who was not entitled to retain or apply the price of the subjects conveyed, in liquidation of advances made or goods furnished to Gilchrist by the company of Alexander and John Downie. This plea was, however, repelled by the Court, and was treated as a fallacy by no less eminent a judge than the late Lord Moncreiff. Lord Glenlee in giving judgment said, 'The pursuers have the very same claim on the funds as Gilchrist would have had.' Apply his Lordship's opinion to the present case, and it is clear that the claimants are in exactly the same position as Thom and Innes, who certainly have nothing to recover from Paterson & Co.

"It is said that the claimants are preferable creditors, their claim being for wages. This is true; but preferable creditors cannot prevail when there is nothing to be preferred upon. A very great deal has been said about a certain judgment pronounced by Sheriff Smith in the recent case of *Milne v. Noble, 'Boatie.'* I have never been able to see how that judgment affected the present action. If Sheriff Smith had decided that curers who are *the creditors* of fishermen, are, nevertheless, bound to pay the hired men employed by these fishermen, the decision would have applied; but he decided no such thing, and would, I believe, be rather surprised were he told that he had. What he appears to have held was, that an arrestee who had paid certain hired men was entitled, when called to account by an ordinary creditor, the arrester, to deduct the amount so paid, wages being a preferable claim.

"If the doctrine now laid down by me does not apply to the present case, then the legal principles applicable to fishing transactions must, indeed, form a singular exception to the general rule of compensation."

Act. Watt—Alt. Soutar.

SHERIFF COURT OF ALLOA.

Sheriffs GLOAG and JOHNSTONE.

PATERSON v. WISEMAN.

"Alloa, 5th January 1883.—The Sheriff-Substitute having heard parties' procurators and considered the cause: Finds in fact, (1) That in July 1881, the pursuer was employed by the occupiers named in the petition to kill the ground game on their crofts at Tullibody (see letters of authority, Nos. 4-5 and 4-6 of process); (2) That the terms of pursuer's employment were that he should himself supply the snares for taking the ground game, and should receive as his reward in some cases the whole and in other cases the half of the ground game so taken by him; (3) That during the past summer (1882) the defender Carmichael, acting under the orders of his employer, Thomas Wiseman, the shooting tenant, repeatedly lifted and carried away the snares set by the pursuer on the crofts referred to, although written authority in favour of the pursuer was produced to him: Finds in law, (1) That on a sound construction of the Ground Game Act, 43 and 44 Vict. c. 47, the pursuer is a person *bona fide* employed for reward by the occupiers of the crofts to kill ground game; (2) That in the circumstances the pursuer has a good title to sue the present interdict; (3) That the defenders are not entitled to interfere with or remove the snares set by the pursuer on the crofts occupied by his employers; there-

fore repels the defences, interdicts the defender Thomas Wiseman, and James Carmichael, his gamekeeper, or any other person in the employment of the said Thomas Wiseman, from removing or interfering with the snares set by the pursuer on the crofts at Tullibody occupied by Andrew and John Paterson and Alexander Whitehead: Finds the defender Thomas Wiseman liable in expenses; appoints an account thereof to be given in, and when lodged, remits the same to the Auditor of Court to tax and report, and decerns.

“TYNDALL B. JOHNSTONE.

“*Note.*—The defender Thomas Wiseman is admittedly the sole tenant of the shootings on the estate of Tullibody, and the proper defender in this action. He has stated a preliminary objection to pursuer's title, as well as defences on the merits. It will be convenient to deal first with the latter. These defences raise a controversy regarding the meaning of the expression ‘*bona fide* employed for reward,’ used in sec. 1, sub-sec. B, of the Ground Game Act, 1880. The defender maintains that the facts disclosed by the proof show that the pursuer is not a person *bona fide* employed for reward, as required by the statute. In regard to employment, he argues that the pursuer cannot in the circumstances be said to be employed at all in the sense of the Act. He (pursuer) is a blacksmith in the employment of his father, he works at his trade for a weekly wage, and merely amuses himself by setting snares during his leisure hours. Moreover, that the evidence shows that the pursuer merely got *permission* from the occupiers of the crofts to kill the ground game, and that there is no *bona fide* employment. Further, the defender argues that there is here, properly speaking, no *reward* in the sense of the Act. The pursuer gets no wage, but merely part of the ground game he kills. His reward, therefore, is uncertain, and may vary even to the vanishing point.

“The Sheriff-Substitute feels unable to give effect to defender's arguments, though these were urged with much ability. There is nothing in the Ground Game Act to indicate that the person employed by the occupier must devote his whole time to the pursuit of ground game, or that he may not be employed in other ways as well; and in the case of small holdings, the occupier might not be able to afford to give, even if his holding could furnish, full employment to the person engaged to kill the ground game. There is no reason from the evidence to conclude that this arrangement, by which the pursuer snared the ground game on these crofts, was sought only by the pursuer, and that the occupiers were indifferent about it. The Sheriff-Substitute thinks it is proved that the crops on the crofts had suffered severely from the ravages of the game, and that the occupiers were as willing to give, as the pursuer was to seek the employment of keeping down the ground game. The fact that the pursuer may have sought this employment does not, it is thought, necessarily affect its *bona fide* character. In regard to reward, the defender's contention amounts to this, that the term ‘reward’ must be held to mean a *money payment*. Such a construction would, in the Sheriff-Substitute's opinion, unfairly restrict the natural meaning of the language of the Act. Had such been the intention of the Legislature, the word ‘reward’ would not have been used; and in the circumstances it must be assumed that the more extensive term was used purposely, and that the reward is not to be limited, as contended by the defender. The evidence on this point shows that while it may vary from week to week, the reward here is, on the average, of substantial value. The pursuer states, and the defender did not attempt to dispute the statement, that the money value of the ground game falling to him varied from 3s. or 4s. to as much as £2 per week; the average being about 10s. per week. The reward therefore earned by the pursuer is not of a merely nominal kind, but forms a very material addition to his weekly wage. On the merits, therefore, the Sheriff-Substitute thinks the defender has failed, and that the pursuer here must be regarded as a person *bona fide* employed for reward to take ground game.

“The Sheriff-Substitute has felt some difficulty with the defender's pre-

liminary plea of want of title. The rule is a salutary one, which refuses to a servant the right to sue in his own name when he has no independent right in himself, and when the real interest is in his employer; and if that were the position of matters here, the objection would probably have been fatal to pursuer's case. But the circumstances here, it is thought, are exceptional. The pursuer comes into Court and asks that his own property, the snares, be protected. His right to these is altogether exclusive and independent of his employers; and if the Sheriff-Substitute is right in holding that he (pursuer) is a person *bona fide* employed under the Ground Game Act, and therefore carrying on a lawful operation on these crofts, it is difficult to see how his title to sue for the protection of his own property can be successfully objected to.

"Some of the crofters who gave the pursuer authority have withdrawn that authority since the present action was raised, and the interdict granted, therefore, does not apply to them. As regards the others, the defender objects to the authority, Nos. 4-6 of process, on the ground that the croft in question is occupied by Andrew and John Paterson as a firm, while the authority is signed only by Andrew individually. The Sheriff-Substitute thinks this objection too critical. The evidence shows that, although John Paterson was not asked to sign and did not sign the authority in question, yet he homologated his brother's actings in regard to the game; and having regard to all the circumstances, and particularly to the evidence of John Paterson himself, it is thought that the writing sufficiently complies with the provisions of the Act.

"The Sheriff-Substitute, on 2nd August last, recalled the *interim interdict* granted on 25th July 1882, because it did not appear *ex facie* of the written authorities, that these applied to the leases then current. It is now clear, however, that these authorities were not intended to be limited to the leases current at their date. The crofters at Tullibody, although holding by verbal leases from year to year, have generally been for many years without a break in the occupation of their crofts. In the case of the Patersons and Alexander Whitehead, the same crofts have been possessed by them and their fathers for about half a century, and they state that they intended the authorities granted by them to be in force in 1882 as well as in 1881, and until recalled by them. The defender, at the hearing, raised a practical difficulty. He objected that, if he is to be prevented from lifting snares on the crofts in question, he cannot protect himself against poachers, as the snares used by the pursuer are not distinguishable from ordinary poachers' snares. Even if it were the case that this resulted in injury to the defender, it would be no sufficient reason for refusing interdict if the pursuer is entitled to it. The objection, however, would apply with equal force to snares set by the occupiers themselves, yet they are not to be deprived of the benefits conferred by the Act, because its operation might make poaching more difficult of detection. It is conceivable that in the case of a large holding the objection here stated by the defender might result in a difficulty unless the occupiers and proprietor agreed upon some mode of distinguishing their snares. But in the present case no real difficulty arises. The crofts in question extend only to twenty or thereby acres. The pursuer lives close beside them, and appears to be so diligent in snaring the ground game that a poacher would be very unlikely to select such a spot for his operations. If the Sheriff-Substitute is wrong in this view, it is an easy matter for the pursuer to agree with defender's gamekeeper upon some particular mark in his snares, which will distinguish them from others. It will be for the interest of pursuer to come to such an arrangement, for, as granted, the interdict only prohibits interference with the snares set by the pursuer, and it might hardly amount to a breach of interdict if a gamekeeper removed a snare in the honest belief that it belonged not to the pursuer, but to a poacher.

"It is evident that the operations of the pursuer, as carried on at present, must tend somewhat seriously to injure the interests of the defender as shooting tenant. The crofts in question lie on the edge of a large cover, and crops of different kinds are grown on them which must prove more or less irresistible

to the ground game, but this injury to the interests of the defender, while it is certainly a matter to be regretted, does not seem to be a consideration which is relevant to the case.

T. B. J."

"*Edinburgh, 23rd February 1883.*—The Sheriff, having resumed consideration of the cause, recalls the interlocutor of the Sheriff-Substitute, dated 27th December 1882, dismisses the complainant so far as directed against the defender, Thomas Wiseman; further finds that—(1) Andrew Paterson and John Paterson, mentioned in the petition, were in the summer of 1881, and have since continued to be, in the sense of the Statute 43 and 44 Vict. c. 47, occupiers of one of the crofts known as Tullibody crofts, and forming part of the lands of Tullibody, and that Alexander Whitehead, also mentioned in the petition, was at said date, and still is, in the sense of the said Act, occupier of another of said crofts; (2) That the pursuer then was, and has since continued to be, employed for reward by the said Andrew and John Paterson and Alexander Whitehead to take and destroy the ground game on their respective crofts; (3) That he held and holds the written authority of the said crofters to that effect; (4) That in order to the taking and destruction of the said game, the complainer set snares on the said crofts; (5) That the snares were his own property; (6) That the defender, Thomas Wiseman, is the game tenant of the lands of Tullibody, including said crofts; (7) That his gamekeeper, by his directions, lifted certain of the snares so laid down by the pursuer, and that the defender maintains that he is entitled to lift them; (8) That the said snares were lawfully set by the pursuer on said crofts, and that the defender was not entitled to interfere with pursuer's snares so set by him. Therefore repels the pleas in law stated for the defenders, except plea 2, and of new interdicts the defender, Thomas Wiseman, by himself or by any one in his employment, from removing or causing to be removed the snares belonging to the pursuer, and set by him on the crofts at Tullibody occupied by Andrew and John Paterson and Alexander Whitehead: Finds the defender, Thomas Wiseman, liable in expenses: appoints an account thereof to be given in, and remits it to the auditor of Court to tax and report, and decerns.

"W. E. GLOAG.

"*Note.*—Questions of considerable interest and importance, in reference to the Ground Game Act 1880, arise in this case. The Sheriff agrees substantially with the Sheriff-Substitute: but the preceding findings express, he thinks, more exactly than the interlocutor of the Sheriff-Substitute, the somewhat special grounds on which he is disposed to rest his judgment. The defender, Thomas Wiseman, is game tenant of Tullibody, including the crofts of Tullibody. His gamekeeper, by his directions, has lifted, and he asserts his right to lift, snares for rabbits set on certain of these crofts by the complainer. The complainer prays that the defender shall be interdicted from doing so; and he rests his case on the provisions of the Ground Game Act. That Act provides that an occupier of land shall have right to kill and take ground game thereon; and that he may do so himself 'or by persons duly authorized by him in writing,' and with regard to the persons who may be so authorized, it is provided that no person shall be so authorized by the occupier except members of his household, persons in his ordinary service on the land, 'and any one other person *bona fide* employed by him for reward in the taking and destruction of the ground game.' The complainer's right depends on the words quoted. The petition prays for interdict against lifting snares from four of the crofts; but the occupiers of two of them have withdrawn the authority which they gave, and consequently the interdict granted has reference to two crofts only—the one occupied by Andrew and John Paterson as joint-tenants, and the other by Alexander Whitehead. The appeal is by the defender, Thomas Wiseman. It has not been disputed that the Patersons and Whitehead are occupiers of their respective crofts, and are as such entitled, in respect of the Ground Game Act, to kill ground game thereon, and to give such authority to others to do so as the statute warrants.

The first question is: Has the pursuer the written authority of the occupiers? He has produced his authorities, Nos. 4-5 and 4-6 of process. It has not been disputed that 4-5 is a sufficiently expressed authority by Whitehead, but the defender maintains that 4-6 is not a sufficient authority to kill the game on the croft of the Patersons, because it is signed by Andrew Paterson only, and not by John. The Sheriff concurs with the Sheriff-Substitute in thinking this objection too critical. He is of opinion that Andrew Paterson may be held in this case, and in respect of the evidence, to have acted with the implied authority of his brother in adopting this precautionary measure for the protection and benefit of their joint possession. Had his act been repudiated by his brother, the case would have been different, but it has, on the contrary, been adopted. There is no reason to doubt that John Paterson would, if asked, have signed the authority as well as his brother; and the Sheriff does not think himself bound to read the Act in so strict and judicial a way as to reject a written authority signed by one of two joint-occupiers as not expressing the authority of the other occupier also. He thinks that the document 4-6, signed by Andrew Paterson and adopted by John, satisfies the statute. The Sheriff further thinks that his written authority, once given, subsists until it is withdrawn, or until the power to grant it has ceased. The defender maintained that the pursuer was not such a 'person' as the statute had in view; and that because he is a man whose time may be presumed to be occupied by his ordinary and settled avocation, and because his time has not been placed at the disposal of the occupiers. But the statute neither requires nor implies that the person employed shall devote all his time to the employment, but if necessity contemplates, and implies occasional occupation only. The next question, and perhaps the most difficult, is this: Can it be affirmed that the pursuer was *employed* to kill the ground game? that is to say, was there a contract of employment between him and the occupiers, having for its object the destruction of the game? The defender contends that it is not sufficient that the pursuer should have the permission of the occupiers to kill the game, but that the statute requires that, in this particular case, there should be a mutual bargain on the subject. Assuming this view of the statute to be correct, the Sheriff has, on full consideration, come to the conclusion that there was such a contract of employment between the occupiers and the pursuer. No part of that contract is expressed in the written authorities 4-5 and 4-6. It was a verbal contract only; and the conditions of it are to be ascertained by the parole evidence. But the statute does not require a written contract of employment. This contract was certainly an extremely indefinite one, for it had no term of endurance, and might be put to an end by the occupiers at their pleasure, if not also by the pursuer. It contained no provision as to the hours during which the pursuer should be at work, nor as to the time within which the contract was to be fulfilled. Still it is thought that the pursuer undertook a definite obligation, viz. to kill the rabbits;—as to method, time, or degree there was no stipulation; and as to that, probably all that could be said is, that he was bound to fulfil his obligation in a reasonable manner and within a reasonable time. It may at first sight appear as if there was no counterpart to this obligation, and as if the occupiers undertook no obligation at all, and certainly it is not easy to see how they could commit a breach of contract. But that arises from this accidental circumstance, that the pursuer had the means of paying himself in his own hands. His right under the contract was to receive the one half of the rabbits killed; but he satisfied that right by retaining them. As the rabbits were wild animals, the property of them was acquired by killing or taking them. But if the pursuer should kill the rabbits by the authority of the occupiers, he would thereby acquire right to them, which previously belonged to nobody, *quod nullius est fit occupantis*, but this acquisition would be not for himself, but for his employers. But for the stipulation that he was to keep the half of them, he would, it is thought, have been bound to surrender them all to the occupiers who employed him. Instead of giving them all, and then demanding the half of them back, in implement of the obligation of the

occupiers, he, with consent of the occupiers, retains the half, so that it is thought that there was here a true contract of employment with counter obligations, out of which the actions incident to that kind of contract might arise, although the argument that the whole arrangement or understanding was too indefinite to amount to a contract, appears to deserve serious consideration. The statute further requires that the employment shall be *bona fide*. It appears to the Sheriff that these words are somewhat idle and add nothing to the meaning. A contract of employment, which was not *bona fide*, would not be recognised by the law at all. But the Sheriff may say he is of opinion, on the evidence, that the crofters truly desired the destruction, total or partial, of the rabbits, because they injured their crops, not unaffected perhaps by an inclination for the rabbits themselves; and that the pursuer desired to keep or sell the rabbits which he killed, and that his motive was profit, not sport. If by the provision that the employment should be *bona fide*, it was meant that the parties should contract with these or similar motives, then in the present case that requirement of the statute, if such a statutory requirement can be imagined, was satisfied. The statute further requires that the employment should be for reward. The defender contends that this requirement has not been satisfied. The statute, however, does not require that the reward should be pecuniary. Probably it was meant that it should be substantial, or, at least, not illusory; but if the Sheriff be right in the opinion that the rabbits when taken were acquired, not for the pursuer himself but for his employers, then it appears that the half of them, which was to be his wage, was a reward, real, substantial, and adequate. It therefore appears that the conditions of the statute have been fulfilled; and, if so, it follows as an immediate consequence, that the pursuer was entitled to set his snares on the crofts, that the defender was not entitled to lift them, knowing them to have been set by the defender, and that on lifting them he was a wrong-doer, liable to interdict. But from this, it by no means follows immediately or obviously, that the pursuer is in a position to sue for interdict. His employers would certainly be entitled to do so; but whether he, as the person employed for reward to kill the game, has an independent title, appears a difficult question. Probably, however, it is not a question of great practical consequence, it is (practically speaking) more a question of form than of right; and it is not easy to understand why the difficulty has been allowed to rise. It would not have arisen had the occupiers, who granted the pursuer his authority, concurred in the petition. As the case was originally brought, it did not appear from the statement or the pleas that the snares were the property of the pursuer. This, however, appears to have been so; and the judgment of the Sheriff-Substitute is rested to some extent on that circumstance. It appeared to the Sheriff, however, that that speciality could not properly be made a ground of judgment, unless it was averred and pleaded, and he accordingly allowed the record to be amended by the addition of a statement to that effect, and a corresponding plea. It appears to the Sheriff that the fact that the traps were the property of the pursuer, is of consequence, and may warrant a judgment in the pursuer's favour, without determining whether he would have a title but for that speciality. The case seems analogous to the case of a builder or other tradesman, who uses his own tools, and would be entitled to ask interdict against any one who wrongfully interfered with them. The ground of judgment may be in this case somewhat narrow, but it appears to be sufficient. Whether the defender would be guilty of breach of interdict if he removed snares, not knowing them to be the pursuer's, need not at present be determined. Probably the question will not arise, because the pursuer will find it for his interest to take care that, in some way or other, the traps which he sets may be known to be his, by the defender and his gamekeepers. The Sheriff at one time doubted whether there might not be room for modifying expenses. But considering that the pursuer has won the real question at issue, he has come to the conclusion that he should have full expenses. If there be any separate expense applicable to points in

the case in which he has not been successful, that will be dealt with by the auditor in the usual way. W. E. G."

Act. Ewing—Alt. MacWatt.

SHERIFF COURT OF CLACKMANNANSHIRE.

Sheriff-Substitute T. B. JOHNSTONE and Sheriff GLOAG.

MORRISON v. WATSON.

Delivery of Deed—Solicitor's hypothec—Employment of unqualified person.—

This was an action at the instance of Mr. John Morrison, executor of Miss Cochrane, Tillicoultry, against Mr. Robert Watson, residing at Cairnton Cottage, Tillicoultry, for delivery of Miss Cochrane's settlement. The defender refused to deliver the deed until he should be paid certain fees and outlays which he maintained he was entitled to be paid. The pursuer, on the other hand, maintains that Mr. Watson, not being a professional man, was not entitled to make any charge, as he had no lien or hypothec over the deed. Sheriff-Substitute Tyndall Johnstone has issued the following interlocutor:—

"ALLOA, 22nd December 1882.—The Sheriff-Substitute having resumed consideration of the petition with the minute of admissions for the parties: Finds (1) that at the request of the late Miss Euphemia Cochrane, the defender in 1875 prepared her will or deed of settlement. (2) That Miss Cochrane died some months afterwards (in 1875), and that the defender has since, with the knowledge and consent of the pursuer, retained said will or deed of settlement, and has also performed certain services in connection with deceased's estate. (3) That under said will the pursuer was appointed executor. (4) That the defender refuses to deliver up said will to the pursuer until he has been paid a sum of £36, 1s. 4d. for services alleged to have been performed by him in connection with the estate. (5) That the defender is not a duly qualified and certificated law agent and conveyancer. Finds in law that the defender is entitled to retain said will until he is paid a reasonable sum as remuneration for his trouble in preparing it, and to this extent sustains the defences, *quoad ultra* repels the same. Ordains the defender to lodge in process within seven days a separate account specifying the sum claimed by him for drawing said will; continues the cause in order that said account may be lodged; reserves in the meantime the question of expenses, and decerns. TYNDALL B. JOHNSTONE.

"*Note.*—The defender refuses to deliver up the will in question until he is paid (1) his charges for general agency in connection with the trust estate of the late Miss Cochrane, amounting to £11, 11s., including his charge for preparing the will itself (which charge, however, is not separately stated in his account); and (2) payments alleged to have been disbursed by him on behalf of the executor (pursuer) amounting to £24, 11s. 4d. The Sheriff-Substitute has felt considerable doubt as to whether the defender here has a right of retention to any extent. He is not a qualified law agent, and therefore cannot plead a law agent's right of hypothec. His defence, therefore, so far as it relates to his charge for general agency and to disbursements, must be repelled. It is admitted, however, that the defender prepared the will in question, and it is thought he has a right to retain it on the ground of implied contract until he receives reasonable remuneration for his trouble in its preparation—this right being merely the counterpart of his employment (see *Meikle & Wilson v. Pollard*, Nov. 6, 1880). Although the Sheriff-Substitute has to this extent sustained the defence, he feels considerable doubt on the subject. It seems to be regarded by one legal writer (Henderson Begg on Law Agents, page 220) as an open question whether a *mortis causa* deed like the present can be legally retained, even by a law agent, against the beneficiaries appointed under it, and the case of an executor would be still more doubtful. The circumstances in the case of *Paul v. Meikle*, 11 Dec. 1868, were peculiar, and it cannot be

regarded as a satisfactory precedent in this case. The record contains a large amount of irrelevant history, but it also discloses a state of matters which does not give a favourable impression of defender's position and claims. Neither party having asked for a proof, it seemed to the Sheriff-Substitute advisable to dispose of the case on the pleadings and minute of admissions. T. B. J."

The Sheriff-Substitute's decision having been appealed from, Sheriff Gloag, after a hearing, issued judgment as follows:—

"EDINBURGH, 27th February 1883.—The Sheriff, having resumed consideration of the cause, adheres to the findings in fact in the Sheriff-Substitute's interlocutor; *quoad ultra* recalls said interlocutor; finds that the defender has not proved that there was any agreement or understanding between Miss Euphemia Cochrane and him that he should be paid for preparing her will; or that he should be entitled to retain the will until he was remunerated for preparing it. Therefore repels the defences; decerns and ordains the defender forthwith to deliver the deed of settlement or will, executed by the said Miss Euphemia Cochrane, to the pursuer, as executor-nominate under it. Finds the defender liable in expenses. Appoints an account thereof to be lodged, and remits it to the auditor of Court to tax and report, and decerns. W. E. GLOAG.

"*Note.*—It being admitted that the pursuer is executor-nominate under Miss Cochrane's will, his right to it is unquestionable; and it falls on the defender to establish his right to withhold it until the claims which he advances are satisfied. Now he is not a law agent nor a professional man of any kind, and cannot plead a law agent's right of hypothec. His right must therefore, it is thought, depend on some agreement, express or implied, with Miss Cochrane. Now the facts out of which that agreement must be gathered are all contained in the minute of admissions. All that is established by the minute is that he prepared the settlement at the request of the testator, that he took some trouble connected with the estate after her death, and made certain payments on account of it. The Sheriff-Substitute has held him not entitled to return the will on account of his services or outlays after the testator's death; and to that extent the Sheriff has no difficulty in agreeing with him. The defender, besides, has not appealed, and did not dispute the interlocutor so far as against him. But the Sheriff-Substitute has found the defender entitled to retain the will from the executor until he is paid a reasonable sum for preparing it. On that point I have come to a different opinion. The deed has not been laid before the Court, and one cannot say what sort of deed it is. It may be an elaborate settlement. It may be expressed in a sentence. But of whatever sort it may be, the defender maintains that he is entitled to be remunerated, and to retain it until he is paid. He has offered no direct proof at all in support of his contention. But he maintains that it is all to be inferred from the bare fact that he made the will. Now, the Sheriff is unable to draw that inference. It is possible that the defender may yet establish his right to payment; but the Sheriff does not think he has established it. Seeing that it is not his business to prepare deeds, he may have prepared this will, just as he may have rendered any other neighbourly service, out of mere friendship and goodwill. Still less can it be inferred that it was understood between him and Miss Cochrane that he was to be entitled to retain the will, which was of no value until it was delivered to the executor, until he, the executor, who never employed him, who has no funds belonging to the testator, and cannot get any funds except by virtue of this very deed, should be compelled to pay him out of his private means. The Sheriff-Substitute has held that there was an implied contract that the defender was to be paid, and was to be entitled to retain the deed until paid; and he appears to have formed that opinion mainly in respect of the case of *Meikle & Wilson v. Pollard*, 6 Nov. 1880, 8 K. 69; and if that case were the same as the present, there would of course be no choice but to follow it. In that case a merchant had placed certain documents in the hands of accountants to enable them to collect his debts; the merchant afterwards granted a trust deed for behoof of his creditors; and the accountants were held entitled to retain the

documents against the demand of the trustee until their account was paid. The opinions of some of the judges in that case are certainly of wide application; and seem to lay down the rule, that if documents or things be placed in the hands of a professional man or tradesman, to enable him to perform some work in the line of his profession or trade, the person employed is entitled to retain not only the work done, but also the documents or thing which he received to aid him in the performance of it, until he is paid for his work. But it does not seem necessary to consider minutely how far the principle of that case would go, because it is thought to be distinguished from the present case in very important particulars. There the pursuer was the trustee of the defender's employer, and was suing in his right. In this case it is thought that the pursuer sues in his own right, not in that of the deceased. There also the employer was undoubtedly insolvent. But the main difference between the cases lies in this: that the defenders in that case were employed in the ordinary course of their business of accountants, which they professed to exercise for remuneration; and there was no doubt that the mere employment of them implied an undertaking to remunerate them; now in this case it is thought that there are no sufficient grounds for that implication; upon that very simple ground the Sheriff thinks that this case falls to be decided against the defender, without entering on the somewhat delicate questions which would otherwise arise. Reference was made at the debate to the case of *Paul v. Meikle*, 11 Dec. 1868, 7 M'P. 235, in which the representatives of a law agent were held entitled to retain a *mortis causa* deed in a question with the disponent of a beneficiary. In that case, however, the question related to a law agent's claim of hypothec; and it was marked by this speciality, on which the Lord President lays stress, that there stood against the beneficiary (the pursuer's cedent) a decree for the law agent's account. The Sheriff does not find it necessary to dispose of the general and important question, whether the maker of a will, whether he be a law agent or not, is entitled to keep it from the executor until his account is paid. The point does not appear to have been decided in Scotland, and it would appear that in England no such right is recognized. See Pulling on Attorneys.

W. E. G."

Act. MacWatt—Alt. Laing.

SHERIFF COURT OF KILMARNOCK.

Sheriffs CAMPBELL and ANDERSON.

M'CAIG (TOPPING'S TRUSTEE) v. TEMPLETON AND OTHERS.

The nature of this case is fully explained by the following interlocutor pronounced by Sheriff Anderson:—

"*Kilmarnock*, 26th July 1882.—The Sheriff-Substitute having heard parties' procurators and considered the closed record, with the productions in process, sustains the defences: Recalls the interim interdict and dismisses the action: Finds the pursuer liable in expenses:—Allows the defenders to give in an account thereof, and remits the same when lodged to the auditor of Court to tax and report, and decerns.

THOMAS ANDERSON.

"*Note*.—This petition for interdict was presented on the 1st of June, and interim interdict granted of the same date. It is at the instance of Patrick M'Caig, accountant in Glasgow, as trustee for behoof of the creditors of George Topping, upholsterer in Ardrossan, in terms of the trust deed, No. 5 of process, and concludes for interdict against the defenders, Messrs. Templeton, carpet manufacturers, Glasgow, selling certain effects belonging to Topping, and which had been poinded by them. On the 18th of May last the defenders obtained a decree in the Small Debt Court here, against Topping, upon which he was charged on the following day, the 19th. When the days of charge expired, and on the 30th of May, the defenders poinded the effects of Topping mentioned in the present petition, and this, the execution of poinding No. 11 bears, the officer did 'by delivering the inventory of the poinded effects to the said

debtor (Topping) personally.' In the meantime, and on the previous day, the 29th of May, a meeting of certain of Topping's creditors was held in Glasgow, when, according to the minutes of meeting, No. of 13 process, the pursuer was appointed trustee under the trust deed No. 5 then granted by Topping, and in virtue of which this petition, as already mentioned, was presented two days thereafter, on the 1st of June. The defenders were neither present nor represented at this meeting, nor concurred in it in any respect, and they were neither parties to nor did they acquiesce in the trust deed then granted. The defenders would have carried through the sale of the poinded effects on the said 1st of June, but were interrupted by the interim interdict of that date. It is admitted Topping was notour bankrupt when he granted the trust deed No. 5. The pursuer avers on record that on the 29th of May he sent a clerk with Topping to Ardrossan, 'who received from him the keys of his sale and work shops and thus took possession of the moveables therein.' The defenders deny that this ceremony was gone through, and it is thought unnecessary to allow a proof on the point. Even if the keys were handed over on the 29th to the pursuer's clerk, he must have immediately returned them to Topping, as when the officer went to execute the poinding the next day, the 30th May, he found Topping in possession of the shop, and the effects therein then poinded, as the execution bears. It is not said Topping's premises were closed for a single day, or that the assignation in the pursuer's favour was intimated in any way whatever. Indeed, the very object of a private arrangement, instead of sequestration, is to avoid publicity, and to keep the insolvent in possession of his business, and and so obtain payment of the composition bills as they fall due. The Sheriff-Substitute holds that when this petition was presented the pursuer was not in possession of the poinded effects, but that they were in the actual as well as legal possession of Topping. In this state of matters the defenders plead that the trust deed founded on is void and voidable under the Statute of 1621, c. 18, as well as 1696, c. 5, and can now be set aside by way of exception by the recent Sheriff Court Act. This plea the Sheriff-Substitute sustains. Mr. Bell, in his learned commentary on the second branch of the Statute 1621, c. 18, says: 'To entitle a person to challenge a deed upon this branch of the statute it is requisite, 1st, That he should be creditor who has begun to use such diligence as would, if not interrupted, legally affect the subject alienated. 2nd, That the diligence must be regular and formal, so that if completed it would not be liable to any objection that should prove fatal to it. 3rd, The diligence must have been prosecuted in due course, and without any unfair or improper delay.' In all these essentials it is thought the defenders' title to challenge the deed No. 5 is clear and undoubted. Again, Mr. Bell, in reference to deeds *liable* to challenge, says: 'These are described in the statute as any voluntary payment or *right* to any person in *defraud* of the lawful or more timely diligence of another creditor.' Of course it cannot be said that the deed No. 5 is a fraudulent one, either at common law or in the ordinary sense of the term. On the contrary, if the defenders had concurred, it would have probably been the most beneficial arrangement for all concerned. It was, however, in 'defraud' of the defenders' all but fully completed and lawful diligence, and as they were no parties to the deed, is therefore reducible. It is stated on record and not denied that Topping was notour bankrupt when he granted the deed No. 5, and the Sheriff-Substitute holds that under the Statute 1696, c. 5, it is also null and void. It is unnecessary to refer to all the decisions commented on at the debate, but one or two may be noticed. In the case of *M'Kenzie v. Calder*, 26th May 1868, C. of S. cases, 3rd series, vol. vi. page 833, it was held that trust dispositions for behoof of creditors granted by a debtor after diligence, and within 60 days of notour bankruptcy, to which all the creditors did not accede, were reducible under the Acts 1621, c. 18, and 1696, c. 5. Again, in the case of *Nicolson v. Johnstone & Wright*, 6th Dec. 1872, C. of S. cases, 3rd series, vol. xi. page 179, where a person insolvent granted a trust deed for behoof of his creditors to a trustee who entered into possession of his property, a creditor of the insolvent who was no party to the trust deed used arrestments in the hands of the trustee. There-

after, with 60 days of granting the trust deed, the insolvent absconded, and so became notour bankrupt, and *more* than four months after this was sequestrated. It was held that the creditor, being entitled under the Act 1696 to reduce the trust deed, had secured an effectual preference by using arrestments in the hands of the trustee, which was not effected by the sequestration. In this case there was no question the trustee under the voluntary trust deed had entered into possession of the insolvent's property when the non-acceding creditors used arrestments in his hands, yet the Court held that being entitled under the Act 1696 to reduce the deed, he had therefore secured a preference. The Sheriff-Substitute considers himself bound to hold, where the present defenders have used the corresponding diligence of poinding in even more favourable circumstances, that they too must be preferred to the claims of the pursuer as trustee for Topping's other creditors. It only remains to notice the case of *Wyld, M'Haffie, and Others v. Hannah and Others*, and *Grant v. M'Edwards' Trustees*. On both of these the pursuer relies, though the Sheriff-Substitute does not think either of them supports his contention.

"The first case apparently does so, but not in reality. It is very shortly reported, but the ground on which the decision went, as explained by Lord Medwyn in the subsequent case of *Grant*, was the want of a reduction of the trust deed, and that being no longer necessary, the case is not a decision in the pursuer's favour. The case of *Grant v. M'Edwards* is clearly one to justify the present decision. The rubric is, 'Circumstances in which a trust deed for behoof of creditors was set aside under the 2nd branch of the Act 1621, as being in defraud of a begun diligence of a particular creditor.' The circumstances are very similar to those of the present case. Lord Medwyn, who delivered the leading opinion, says, 'The case of *M'Haffie* was before me (meaning as Ordinary), and the difference was that in it there was no reduction, while here there is.' As before noticed, a reduction is no longer necessary. The deed can now be challenged by way of action or exception, so that the case of *Grant v. M'Edwards*, so far from supporting the pursuer's plea, is on the contrary directly in favour of the defenders. T. A."

The pursuer appealed to the Sheriff. In addition to the points argued before Sheriff Anderson, the pursuer maintained that there was no evidence in process of Topping's notour bankruptcy, and that as the sum in the decree obtained against him by the defenders was under £8, 6s. 8d., the debt was not one on account of which imprisonment had been rendered incompetent by "The Debtors (Scotland) Act, 1880," and notour bankruptcy could not be, and was not constituted by Topping's insolvency concurring with his having allowed the days of charge under the decree to expire without payment. The pursuer also withdrew the admission of notour bankruptcy made at the debate before Sheriff Anderson. The defenders answered that under the statute referred to imprisonment was rendered incompetent *on account of any civil debt*, with the exception of taxes, fines, or penalties due to Her Majesty, rates or assessments lawfully imposed or to be imposed, and sums decerned for aliment; that notour bankruptcy could be constituted by insolvency concurring with a duly executed charge for payment, followed by the expiry of the days of charge without payment of *any civil debt*, irrespective of its amount, provided it did not fall within the class of exceptions above mentioned. Sheriff Campbell pronounced the following interlocutor, adhering to his Substitute's decision:—

"*Kilmarnock, 22nd November 1882.*—The Sheriff having considered the appeal for the pursuer, with the reclaiming petition in support thereof, answers thereto, and whole process: Adheres to the interlocutor appealed from: Finds the pursuer liable in the expenses of the appeal, and dismisses the same.

"N. C. CAMPBELL.

"*Note.*—The grounds in fact, on which the Sheriff has based his judgment, are these: First, The defender executed his poinding of the effects in question, belonging to his debtor Topping, on the 30th of May last, and the regularity and validity of the poinding are not disputed except on the ground of the

granting of the trust deed after mentioned on the 29th of the said month. Second, This trust deed was executed by Topping in favour of the pursuer, as trustee for his creditors, when he was notour bankrupt. This is stated by the defender on record, and is not denied by the pursuer, although he had an opportunity of denying it on adjustment. Further, the pursuer in his reclaiming petition admits that at the debate before the Sheriff-Substitute, he orally admitted this, and seeks to withdraw the admission after judgment has gone out against him; but withdrawal cannot be permitted in such a case as this, because the whole proceedings of Topping and his creditors and the pursuer in calling a meeting of creditors, hastily getting a trust deed executed, and getting the concurrence of the creditors, with the exception of the defender, are entirely consistent with the admission of notour bankruptcy, and not consistent with the tardy denial of it. Thirdly, The pursuer does not aver that he ever took actual possession, or was in any true sense in possession of the poinded effects at the date of the poinding. What he avers is this, that he, an accountant in Glasgow, whose only place of business is Glasgow, sent one of his clerks to Ardrossan on the 29th, and there received delivery from Topping of the keys of his business premises, 'and thus took possession of the said moveable estate.' This is not taking possession of Topping's moveable property in any true sense of the term. The clerk no doubt returned to Glasgow, but he left Topping in possession of the premises as previously. If he had a case of entering into and holding the real possession of the personal property of the bankrupt, he was bound to have averred it clearly and unmistakeably on record. Such are the material facts of the case, and having regard to them, the Sheriff has no difficulty at all in adhering to the judgment appealed from, and on the very same grounds as those stated by the Sheriff-Substitute in his interlocutory note. It is wholly unnecessary to repeat them. N. C. C."

Act.—Kirkhope, solicitor, Ardrossan.—*Alt.*—Finlayson Laidlaw, solicitor, Kilmarnock.

SHERIFF COURT OF PERTH.

Sheriffs MACDONALD and BARCLAY.

ORIMISTON AND GLASS v. RUSSELL.

Sale—Order—Breaking bulk.—In March last the traveller for the pursuers called on the defender at Pitlochry and obtained an order for albums of views among other goods, the albums being of the kind chiefly supplied to tourists. Parties differed as to the amount of the order, the traveller maintaining that it was for 500 albums in cloth and 72 with fancy white wood covers, while the defender maintained that his order was for 144 in cloth and 72 in white wood. In corroboration, the traveller produced his note-book, admittedly written at the time; while, on the other hand, defender and his son both swore to the order as maintained by them. It further appeared from the evidence that defender immediately returned by rail the number of albums in excess of what he said was his order, and some of the white wood albums which he alleged were damaged—retaining the rest. While he returned the goods in the end of July he gave no explanation of his reasons for doing so till the middle of September—well on in the tourist season—and only after he was repeatedly written to by the pursuers on the subject for his reasons. In these circumstances, Sheriff Barclay decided in favour of the pursuers, with the following note:—

"The traveller is distinct as to the terms of the order. This is corroborated by his note-book. Though it is not equal to a second witness, it is strongly corroborative, especially as the defender's son swears to seeing the traveller take a note at the time. The order is strengthened by the same quantity being given the previous year, though under certain circumstances not fulfilled. The amount of the order, though certainly great, is also supported by the additional expense incurred by certain alterations and the defender having the monopoly of sale in the district. The defender's defence at once fails by certain quantities

being returned and others retained without any letter of explanation. Perhaps had such been made, the retention of others might have exempted the defender from the rule of 'breaking bulk,' which is more applicable to gross quantities consolidated like tea and sugar, and not to goods which admit of easy separation without detriment to the remainder. But the return of goods without any notice of the reason of rejection admits of no apology, and is adverse to every rule of regular mercantile transaction, and, indeed, is rather corroborative of the order; but that the purchaser had afterwards conceived that he had given too great an order, and that less would have served him, and so, when too late, tried to save himself at the expense of another merchant, whom he had misled into an order which he had afterwards considered was in excess of his wants.

"H. B."

On an appeal Sheriff Macdonald affirmed the judgment with the following note:—

"It is quite out of the question for the defender to excuse his not answering pursuer's letters in the way he does. In the circumstances, the Sheriff cannot hold that there was proper rejection and return of goods as disconform to order."

Act. M'Leish—Alt. M'Cash.

Notes of English, American, and Colonial Cases.

COPYRIGHT.—*Musical composition—Sole liberty of performing—Place not of dramatic entertainment* (5 and 6 Vict. c. 45, s. 20).—A musical composition was publicly performed without the consent of its proprietor,—*Held*, that the performance, although not at a place of dramatic entertainment, was contrary to 5 and 6 Vict. c. 45, s. 20.—*Wall v. Taylor. Wall v. Martin*, 51 L. J. Rep. Q. B. 547.

MASTER AND SERVANT.—*Employers' Liability Act, 1880* (43 and 44 Vict. c. 42), s. 1—*Injury to workman—Contract by workman against Act applying—Lord Campbell's Act* (9 and 10 Vict. c. 93), s. 2—*Widow's right of action where husband has contracted himself out of the Employers' Liability Act, 1880* (43 and 44 Vict. c. 42).—A workman may contract for himself and his representatives in case of death not to claim compensation under section 1 of the Employers' Liability Act, 1880 (43 and 44 Vict. c. 42). *Griffiths v. The Earl of Dudley*, 51 L. J. Rep. Q. B. D. 543.

That section does not render such contract invalid, but removes the legal presumption of an implied contract between employer and employed that the former should not be liable to the latter for injuries caused by the negligence of a person in the common employment.—*Ibid.*

Such a contract by a workman is not contrary to public policy, and binds his widow suing under Lord Campbell's Act (9 and 10 Vict. c. 93).—*Ibid.*

SOLICITOR AND CLIENT.—*Implied authority—Execution—Direction to sheriff.*—The defendant having recovered judgment against one Law, issued by his solicitors a writ of *fi. fa.* to the sheriff to levy execution. The sheriff being in doubt as to whether Law was partner in a certain brewery business, asked for information of the defendant's solicitors. In answer to the sheriff's inquiry the solicitors' clerk answered that Law had a share in the brewery, and that the sheriff had better seize there. Afterwards the sheriff seized some goods at the brewery, which turned out to be the property of the plaintiff, who thereupon brought an action of trespass against the defendant,—*Held*, that there was no evidence to go to the jury that the solicitors' clerk had directed the sheriff to seize the goods.—*Keal v. Smith*, 51 L. J. Rep. Q. B. D. 487.

SALVAGE.—*Jurisdiction of justices of the peace—Merchant Shipping Act, 1854*, ss. 458 and 460.—In order to give justices jurisdiction in respect of a salvage claim, there must be evidence that the vessel to which the services were rendered was used in navigation.—*The Mac*, 51 L. J. Rep. P. D. & A. 20.

THE JOURNAL OF JURISPRUDENCE.

CAPACITY TO MARRY.—V.

(Concluded from p. 177.)

THE results of the survey of the subject contained in the previous articles seem capable of being summed up somewhat to the following effect:—American law adopts, pure and simple, with certain deviations embodied in the decisions of some Southern tribunals arising out of the special circumstances of white and coloured marriages, the doctrine that the validity or invalidity of all contracts, including that of marriage, is governed by the *lex loci contractus vel actus*, and admits no distinction between essence and incidents, contractual capacity or competency and form; that the law of Scotland may be said—in the absence of express decision, but in presence of judicial *obiter dicta* and of the institutional *dictum* of Lord Fraser—to be the same; that the law of England, up to the decision in the Court of Appeal in the case of *Sottomayor v. De Barros*—the case of *Brook v. Brook*, though in principle opposed to the rule not having been so regarded by English lawyers, particularly (*teste* Phillimore in the first *Sottomayor* case) when taken along with the contemporary decision in the case of *Simonin v. Mallac*—was likewise the same; but that the two *Sottomayor* cases must, till reversed or altered, be regarded as now ruling that capacity to marry is regulated by the *lex domicilii* where *both* parties are by it incapable; but that, where one of them is domiciled in England, and under no incapacity, the marriage will be held valid; that, while the authority of the former rule as to the validity or invalidity of contracts in general has been possibly shaken by the *obiter dictum* in the judgment in appeal in the first case, it cannot yet (*teste* Hannen in second case) be regarded as abrogated; and, finally, that the laws of the States of continental Europe adhere uniformly to the rule that civil capacity of every kind, including more particularly matrimonial capacity,

is to be regulated *lege domicilii*, a distinction as regards marriage being drawn betwixt capacity and form, the latter falling always to the regulation of the *lex loci contractus*, while the fixing of the boundary line between these is a matter for the several decision of each State for itself.

Of these two mutually conflicting theories, which has the more part of principle and utility on its side? In treating of civil capacity in relation to marriage, it is impossible to keep altogether out of the discussion the larger question of civil capacity in general—to do any act or enter into any relation which is regulated by civil law; for the consideration of the more limited question, as soon as abstract grounds are reached, passes into that of the wider one. Should, however, the recent tendency of English law, instanced in the cases of *Brook* and *Sottomayor*, prove the prevailing one on the narrower issue, while expediency, in the interests of unrestricted commerce—notwithstanding the bid of Justice Cotton for a revolution in that sphere also—will probably forbid its application to the wider one; and should the law of Scotland, when the question does occur there, follow the lead of the larger kingdom, it will be requisite to treat the particular aspect of the question apart from the general one.

The advocates of either doctrine—Story, Fraser, Bishop, and Sir Cresswell Cresswell, for the one side, equally with the continental jurists and Sir Henry Cotton on the other—start with the incontestable proposition of the advantage of having one uniform test of validity for the marriages of the subjects of all civilised States, whose regulation of matrimonial capacity in the cardinal matters of the forbidden degrees, monogamy, marriageable age, are in the main alike; the champions of each cause contending that their view is the one most calculated to secure the much desired uniformity. Take the crucial instance, of whose frequent occurrence we have lately heard so much, of the Frenchman who has failed to obtain parental consent to, or to make the necessary publication of, his intention to marry at the place of his domicile, and who comes to England and marries, perhaps with the preformed intention of afterwards abandoning her, an Englishwoman there, validly *lege loci contractus*. He takes his pretended wife home with him, and, after a year or more, or possibly a few months, according to the time it may take him to get tired of her, he turns her adrift in Paris, probably penniless, and certainly friendless and helpless, perhaps with one or more children, or the prospect of such. The home and all the ties of life of the man whom she believed to be her lawful husband are in France. There she is only a woman living in illicit union with a man. It is little satisfaction to her that the Courts of her own country will recognise her status as a married woman, for her husband will not come there. The French Courts say, 'We are very sorry for you, but we can't help it. The marriage violated our law, which,

in this case, follows its subjects abroad. In a matter of such prime importance you ought to have informed yourself beforehand—and for this we provide the means—of your proposing husband's capacity.' The English Courts say, 'Your marriage is perfectly valid, and here at least we will maintain it. Your unfortunate position arises entirely from the obstinacy of these Frenchmen, who will not recognise the proper rule, as we do.' Meantime, in the clash and conflict of systems the victim falls to the ground, and is trampled in the mire of wretchedness and scorn. Merely to state the case is to show it worthy of the most strenuous efforts of the legislator and the judge in every State to prevent the possibility of its recurrence, by finding one uniform and easily verified criterion of the validity of international marriages.

The consequences of marriage—the relative positions of the spouses towards each other, legitimacy of issue, parental power, rights of succession (whether between ascendants and descendants, or between collaterals, for without marriage there can be no lawful kinship)—are recognised by every law as questions of civil status to be determined by the law of the domicile or of the nationality, and never by that of the place of mere residence or of contract. So also—except in some of the Western States of America, if indeed it be still so even there—with divorce. The subsistence of the married condition, so far as affected by the operation of law, its dissolution and the effects—so far as they involve questions of status—which remain after it is dissolved, are determined, in the view of all lawyers, by the law of the domicile. By the supporters of the domicile theory of matrimonial capacity, the inception of the married condition is likewise regarded as determined in the same way; while, by the advocates of the opposite view, it, which surely does not yield in moment to any of the others, is determinable by the accident of temporary stay, it might be for only a few hours, within the jurisdiction of this or that particular law. Here we touch on the question of the nature of marriage as cognizable by law. Is it merely a personal contract like partnership, which is dissoluble by the will of the parties alone; or is it more, is it, as Lord Penzance has called it, an "institution," or a status? The discussion of this question lies beyond my limits; suffice it to say, that on this matter I agree with Fraser, Story, Bishop, and most recent writers, that marriage, so far as dependent upon the consent of parties, is indeed a contract, but beyond that is far more—that it is a kind of status. Mr. Bishop himself has pointed out that the misapprehension inherent in the former legal conception of marriage has arisen in great part from the misapplication of the term contract equally to the marriage relation and to the transactions of everyday life. If, then, marriage be a kind of status and not a mere consensual contract, does it not fall to be regulated by the principles which govern other forms of status? The advocates of the *lex loci* would divorce it in its inception from its

natural kin, and even from those forms of status which flow from its contraction. Our own highest authority is in this matter inconsistent with himself. In his work on *Parent and Child and Guardian and Ward*, where he enters into a lengthened discussion of the international aspects of his subject, Lord Fraser comes to the conclusion that, though express decision there also, as well as on the question of matrimonial capacity, is lacking, the law of Scotland favours the continental practice of determining majority and minority *lege domicilii*; and it is on the principle that questions of this kind are questions of status that he bases his opinion (p. 576). "By the law of Scotland, questions touching minority or majority belong to the law of status. . . . As a matter of legal principle, then, it may seem that our law must, in consistency with itself, hold minority to be a purely personal matter, dependent upon the *lex domicilii*, according to the rule of International Law relative to status. There is, however, no direct decision to this effect. Nay, in some old cases there are expressions of judicial opinion which seem to point to an opposite conclusion. But the tendency of the law in the present day seems to be distinctly towards giving extended effect to the dependence of *status* upon domicile. In regard to questions of marriage, divorce, and legitimacy, the *lex loci*, where the celebration of marriage, the act of adultery, or the birth of the child took place, is by the later cases much restricted in its application; and the bearing of such acts upon the legal condition of the persons is more steadily referred to the law of the domicile." And again on p. 581, "Now there seems to be nothing incongruous in holding that Scottish citizens, before entering into important transactions with a foreigner so situated, shall ascertain the extent of the incapacity which the law of his domicile has judged best for him. *If, for example, he proposed to enter into marriage with a Scotchwoman here, while the laws of his domicile render the marriage of a minor null when without the consent of his parents or guardians, surely there is nothing unreasonable in expecting that proper inquiries will be made beforehand as to his legal capacity.*" Let us compare, or rather contrast, this with what we find in *Husband and Wife*, on p. 1299: "The first of the above views, which refers capacity to contract to the law of the place of celebration or contract, is that which has been adopted in the British Dominions and in America. If a man be a minor in his native country, but have attained the age of majority according to the law of Scotland, he will be treated as a person of full age in Scotland, with reference to any contract he has entered into in that country. So, again, if he cannot marry in his own country by reason of not having attained the age of twenty-one, or without the consent of parents, the Scotch Courts will hold that he has entered into a valid marriage in Scotland, if he have attained the age of fourteen, notwithstanding that he has not obtained the consent of his parents, and is under the age of twenty-one." The

italics are my own. And this is in the same work in which he has already favoured his readers with a full discussion and a most convincing argument in favour of the status theory as against the contract theory of marriage. Had the learned author forgotten in 1876 what he wrote ten years before? If the tendency of the law in Scotland in 1866 was to refer questions of status (including those arising out of the "celebration of marriage") to the law of the domicile, certainly nothing had happened since to reverse that tendency, but rather to continue it. Did he fail to remember, when, in stating the *lex loci* theory of matrimonial capacity as the law of Scotland in his later work, that he had there furnished a powerful argument for the doctrine which he was here rejecting? If the *lex domicilii* regulates legal age, and in that regard fixes capacity for ordinary transactions which do not involve a change of status, as marriage does, then, surely, *à fortiori*, it should govern capacity to enter into the most momentous, both in its nature and consequences, of all human relations, into that *conjunctio maris et feminae, et consortium omnis vitæ divini et humani juris communicatio*, which, according to Lord Stowell, is "the parent and not the child of civil society." Could he have had all this in mind, and yet applied the rules governing the validity of the ordinary contracts of everyday life to what he regards as an institution of divine origin? According to the doctrine favoured in *Parent and Child*, a foreign minor could not, in this country, buy a rood of land, or bind himself by his signature to a bill of exchange, if his own law forbade it; while, by that laid down in *Husband and Wife*, he could enter into marriage, with all its immense results!

As far then as the argument from principle goes, it would appear to be all in favour of the *lex domicilii*. The argument most advanced by its supporters in favour of the *lex loci* is the great practical advantage of the rule. That, contrasted with the operation of the other rule, it tends to remove obstacles from the way of those who are in haste to be married, is true. It certainly affords greater facilities to those who find the restraints of their own law inconvenient, and desire to evade them. But is its operation in this respect beneficial, or the reverse? It is acknowledged by all writers on private International Law—by Lord Fraser himself—to be a sound argument that each State is the best judge—from considerations of climate, law, religion, national characteristics, or otherwise—to whom among its subjects marriage should be permitted or forbidden; and that the evasion of the law by those who for such reasons are placed under it, is a matter to be discouraged, not fostered by International Law. To hold out to those who wish to evade the restraints of their own law—usually young persons, who are absolutely, or conditionally on the consent of parents or others, prohibited from marrying, as in the famous Gretna Green marriages—an invitation to slip over an imaginary line, and set what their own law considers its salutary provisions

at defiance, is to put a premium upon fraud, which it is the office of the law to punish, not to reward. Such a practice involves practical paradox; for in the face of modern facilities of movement from country to country, its outcome is to defeat the operation of the principle of each State being its own best judge of the capacities of its subjects. The supporters of the *lex loci* admit that the legitimacy of offspring is to be regulated *lege domicilii* of the parents, yet they would allow those who are prohibited from having legitimate offspring in their own country to slip off the shackles of their own law, which are to be presumed to have been imposed upon them for their own good, by crossing a frontier for a single day, and, on the other side, to enter into a marriage, the offspring of which their domestic law would be compelled to recognise as legitimate in stultification of its own deliberate enactment.

Mr. Bishop, in commenting on *Sottomayor v. De Barros*, objects to the principle of that decision that, under its operation, "no State could be governed in its marriages by its own laws, but each would be under bondage to the marriage laws of all Christendom." Is this condition of bondage not much more to be found under the operation of his own rule? For under it no State can make sure of the enforcement of its own laws in restriction of marriage, which in the highest wisdom of its Legislature have been deemed most suitable for its own subjects, for they may snap their fingers at the prohibitions of their own law, and choose by what law of Christendom they may desire to have their matrimonial capacity regulated; and their own State is "in bondage" to accord them the freedom which their own fancy may have chosen for the execution of their purpose, which the policy of their own law had forbidden. The English prohibition against the marriage of a man with his deceased wife's sister, or the Portuguese one against the marriage of first cousins, may be sound or unsound on ethical, sociological, physiological, or whatever other grounds their advocates may base them on, but they must still be held as, in the mind of the Legislatures of these countries, right till altered, and proper for the observance of their subjects, all the world over, who, when marrying, contemplate continued citizenship and matrimonial homes within their bounds. The laws of these countries would, on the *lex loci* theory, be in bondage to the caprice of their subjects who chose to celebrate their marriages where these prohibitions did not exist.

The objection primarily taken by every assailant of the domicile theory is, that logically carried out, it would involve the recognition of polygamous or incestuous marriages contracted where such were legal. Undoubtedly the charge is well founded, and, reasoning strictly from principle, there is no escape from the conclusion. But to this objection it is sufficient answer, on practical grounds, that the same result would follow from the strictly logical enforcement of the rule of the *lex loci*.

Justice Turney of Tennessee, in the case of *State v. Bell*, previously referred to, in annulling a marriage between domiciled citizens of that State, one of whom was of colour, had in South Carolina frontier, affords, in a style not infrequent in American oratory, and apparently to be met with also on the bench, which seems to be inspired by association with great natural features of the country,—perhaps, in this instance also, by the feeling of treading on the *ignes suppositos cineri doloso* of the civil war and the recent advent of the black man to equal political rights,—an illustration of how this argument may be used equally well in support of the principle of personal law: “Extending the rule to the width asked for by the defendant, and (*sic*) we should have in Tennessee the father living with his daughter, the son with the mother, the brother with the sister, in lawful wedlock, because they had formed such relations in a State or country where they were not prohibited. The Turk or (*sic*) Mohammedan with his numerous wives may establish his harem at the doors of the Capitol, and we are without remedy. Yet none of these are more revolting, more to be avoided, or more unnatural, than the case before us” (32 *Am. Rep.* 550). The learned judge might have pressed home his attack, and shown the possibility of results still more disastrous; for, by the practice he is in his peculiar exaggerated dialect condemning, the American citizen, whom business or pleasure had called to sojourn “among Gentoos and Pagan Turks,” and who had there legally acquired a harem of many wives, might, with equal right, establish himself where the judge’s alarmed apprehension had seen only the unkin’ Oriental; might he not even—*horresco referens*—attempt to assert his privilege as a unit of the sovereign people of attending with his plural consort a levee at the White House? This would be the case so long as we are dealing solely with the purely logical and abstract consideration of either rule. In fact, the example of “the malignant and the turbaned Turk” claiming recognition for a plurality of wives in a monogamous State is *prima facie* a better stone to fling at the domicile theory than at the other. The same would be the case with incestuous marriages. The British male who went abroad and got a papal dispensation to marry his niece would be under the protection of his home law, because he married validly *lege loci contractus*. So, too, with another objection to the domicile theory urged as serious—that of the quasi penal impediments of certain countries, which are not recognised in those whose notions of liberty are larger, as the Austrian disability of Jews intermarrying with Christians. The English or American Jew who married a Christian in Austria would come under the disability *lege loci contractus*. The result in all these cases would be the same, so long as purely theoretical and abstract reasoning only is applied to either doctrine. But directly we come to practical considerations, the apparently formidable objection to the domicile theory is effectually disposed of so soon

as it is tested by the analogical method—so soon as it is shown that, in practice, the opposing theory lies equally open to it on the same grounds. For the supporters of either theory to batter each other with polygamy and incest is merely to play at pot and kettle.

“But the practical inconveniences of the rule” [of the *lex domicilii*], says Lord Fraser (*Husband and Wife*, p. 1306, note), “are so grave and embarrassing, that Courts in modern days have refused adherence to the doctrine.” We have already seen what he said on the reasonableness of this objection, and the recent tendency of Courts, in his former work. A certain amount of inconvenience must attend every marriage between persons of different domiciles, nationality, or religious faith. Even a marriage between a Scottish and an English spouse is frequently not entirely free from it. But I maintain that the balance of inconvenience is on the side of the *lex loci*. *Prima facie*, it seems likely that as much confusion and difficulty in the affairs of life would arise from the practice that a person should change his status and capacity every time he crosses a frontier, as from the alternative one that his condition should be permanent, as a personal attribute affixed by his own law, which every tribunal, before which he might appear as a litigant, should recognise as so affixed. Under the prior supposition every person whose affairs might lead him, while in a foreign country, into legal relations involving questions of status with others, whether foreigners or natives, there, would have imposed on him the task of acquainting himself with the laws of every country in which he might come into such a position. Under the latter he would be bound to the knowledge of no law but his own. The objection which has been taken to this aspect of the matter,—and to the whole principle of personal law,—that it would require of the Courts of every country a knowledge, as far at least as they are concerned with status, of the laws of every other, is apparent and not real, for foreign law is to every Court a question of fact, proveable, like any other question of fact, by competent testimony.

The rule of the *lex loci*, if consistently applied, obliges persons marrying abroad to a full satisfaction of the *lex loci contractus* not only as to form, but as to capacity. Would it tend to convenience in human affairs, that a German, who had married in England his deceased wife’s sister (assuming both to be domiciled Germans)—that the parties to such a marriage should find, many years afterwards, when children had been born to them, that they had been in ignorance that their marriage was illegal by English law, and void *ab initio*; or, worse still, that their children should discover it after their death, and find their expected inheritance pass from them?

In those countries which adopt personal law as their criterion, means—more or less efficient in each—are at hand for verifying

the status and capacity of their subjects. They must make publication of their intention to marry at the place of their domicile to prevent mistakes or deception in their marriages. In a country like Germany, every one of whose subjects is labelled and registered, and the condition of whose status is known to his Government, from the cradle to the grave, the facilities for obtaining reliable information on the head of any person's matrimonial capacity are sufficiently ample and cheap to remove all objections on the score of inconvenience. Take the case, put by Lord Fraser, of the foreigner coming here to marry a Scotswoman. Is there any more practical inconvenience in her making herself acquainted with the state of his capacity by the law of France or Germany, than there is of his satisfying himself of his own capacity, as well as hers, by the law of Scotland?

Though *Sottomayor v. De Barros* was the first case in which the principle of the domicile was directly and definitely appealed to as the *ratio decidendi*, it is when the advocates of the *lex loci*, appealing to English decision for their rule, encounter *Brook v. Brook* that their difficulty arises, for the House of Lords in that case, though the judges failed to see distinctly whither their judgments were tending, and were professing still to adhere to the established English doctrine, was in reality laying down a powerful precedent for the opposite rule. Some writers, indeed, like Mr. Bishop and Chief Justice Gray of Massachusetts, in *Commonwealth v. Lane*, who can find no intelligible ground on which to reconcile it with their theory, take the bull roundly by the horns, and reject it as unsound. And this is the only logical procedure open to them. Mr. Bishop here finishes up in characteristic style. Were the principle of that case to be followed, "there is," he says, "no estimating how many arrests and trials for criminal cohabitations of parties passing from State to State in our great country composed of many States, or what shiftings of bedding partners will delight the eyes of strumpets and of rakes." Two attempts are made to explain it as an exception. The one is to relegate the marriage to the category of incestuous. This is plainly contrary to the fundamental principles of Private International Law. I am not aware of any country in which it would be so regarded, except those composing the United Kingdom.¹ Even the Colonies have got rid of the prohibition to which their conservative mother fondly clings. To International Law only such marriages are incestuous—being violations of the law of nature—as are universally so regarded by the civilised States of the world which are within its pale. As well might the laws of France or Italy, where no divorce exists,

¹ "L'Angleterre est, à moins qu'il ne faille encore y ajouter l'État de la Virginie, le seul pays où des mariages valides entre beaux frères et belles sœurs, et entre l'oncle et la nièce soient impossibles" ("Étude de Législation Comparée et de Droit International sur le Mariage," par William Beach Lawrence, *Revue de Droit International*, tome ii. (1870) p. 65).

refuse to hold good the marriage of a divorced foreigner had within their jurisdiction during the lifetime of his former spouse, on the ground that it was polygamous. To say that each State can erect its own individual standard of incest, is merely to adopt the principle of the domicile, calling, meanwhile, the basis of the domiciliary prohibition by some other name. The incestuous argument is that adopted by Lord Fraser (*Husband and Wife*, p. 1305), who has elsewhere in the same work devoted many pages and much erudition to demonstrating the groundlessness of the prohibition in divine or natural law, and the futility of its longer subsistence, on moral or social grounds, in the common law or on the statute book. The other argument—that apparently on which we must take the judgment of the House of Lords as mainly rested—is that marriage with a deceased wife's sister being contrary to the public policy of the national law, and “the fundamental institutions” of the country, it must be absolutely forbidden to all subjects wherever marrying, and shall not be allowed to be celebrated within its borders whether by subjects or aliens. This is a more intelligible explanation than the other; but what is it but an adoption *pro tanto* of the domicile theory? To set up the *lex loci* with such a large exception is to make a huge breach in its completeness, and seriously to impair the validity of its claim to universal criterionship. The case for the *lex domicilii* on the other hand is, that, when consistently adhered to and administered, it is *totus, teres, atque rotundus*, and subject to no such damaging exceptions. It would require the invalidity, in Germany of the marriage, wherever had,—there, or in Britain, or elsewhere,—of a domiciled Briton with his deceased wife's sister; in Britain, of a divorced New Yorker during the lifetime of his first wife; of white with black, domiciled in any of the Southern States, where such a marriage is prohibited. It would similarly require the validity in England of the marriage celebrated there between a German and his deceased wife's sister, both being domiciled in Germany, or wherever else the English prohibition did not exist; and of a Spanish uncle and niece under papal dispensation. The last is, to the British mind, a pretty strong instance of the rule, and was put as such by Lord Brougham in *Warrender's* case; but those of a Spanish priest or an Austrian Jew proposing to marry a Christian here are still harder to get over. But, even in regard to these, we can come to no other conclusion than that the rule must be granted its full and legitimate effect. We must either recognise the disabilities which the Governments of these States have thought fit in the exercise of their own best judgment to affix to their subjects, or regard them as beyond the pale of the *comitas gentium*. Better to do the former than to attempt, through the application of our own law to the few instances which may come within our reach, to force on such foreign States, in the persons of their subjects tran-

siently with us, a progress in what we may consider more liberal ideas, for the reception of which their rate of development, conditioned by their own circumstances, may not yet have fitted them. And can we afford to throw stones? For are we not as far behind the rest of the world in ways of our own? If we think that the laws which forbid marriage between white and black, or between Jew and Christian, are a pernicious growth of social and political backwardness, we must recollect that the disability which we still persist in attaching to our deceased wife's ill-used sister, is regarded by the rest of the civilised world to be as absurd and unjust as we hold these. The instances of the marriage here of a slave from such a country as Brazil, which must be admitted within the brotherhood of civilised States, clearly does not fall within the consideration of the question, because, for reasons beyond the limits of Private International Law, other States refuse to recognise the status of slavery in any form.

The principle of the domicile, if adopted at all, must, as pointed out by Lord Fraser (*Husband and Wife*, p. 1533), and as embodied in the practice of the French and Italian laws, be carried out to its logical result, namely, that validity of marriage must be tested by the domiciliary capacity to contract it of both parties—of the woman as well as of the man; and where one of them only—no matter which—lies under such incapacity, the marriage must be held invalid everywhere. In this view of the matter—to put a single illustration—the case of *Mette v. Mette*, where the man had his domicile in England, and his deceased wife's sister in Frankfort-on-the-Main, the marriage being celebrated there, was rightly decided, as far, at least, as the *result* arrived at goes, without saying anything about the *ratio decidendi*. But the result of the application of the rule would have been the same had the domiciles been reversed. This rule, as Lord Fraser remarks, might “lead sometimes to distressing consequences. A foreigner living in this country for years may retain his foreign domicile,” and having married a Scotswoman, the latter may subsequently discover that her marriage is null and her children illegitimate. The remedy for Scotswomen in such circumstances is, “Don't marry a foreigner till you have ascertained where his domicile is, and what is his matrimonial capacity by its law.” So at least she will be safe from the result given by his Lordship. The hardship of having to give up her incapacitated foreign lover at the command of prudence, would be infinitely less than finding, after many years of married life and the birth of children, that, though validly married in this country, her husband may take her to his own domicile and throw her off remediless there.

Though the decision of the House of Lords in the case of *Harvey v. Farnie*, in November last, is primarily one of the value of a foreign sentence of divorce, the opinion of the Lord Chancellor contains some *dicta* of importance on personal law in reference to

status, which are all in favour of the above contention. After having said that if the question with which he is dealing were to be tested by principle apart from authority, although some undeniable cases of conflict did exist between the laws of different countries on questions of matrimonial status, yet, in the circumstances of the case before him, the principles of private International Law pointed in the direction of the validity of the Scottish sentence of divorce, and its recognition by the Courts of other countries, he proceeds—"Upon this point of principle, how does the matter stand? Let it be granted (and I think it is well settled) that the general rule internationally recognised as to the constitution of marriage is, that where there is no personal incapacity attaching upon either party, or upon the particular party who is to be regarded by the law to which he is personally subject, that is, the law of his own country, then marriage is held to be constituted everywhere, if it is well constituted *secundum legem loci contractus*." These sentences might have been taken from the pages of a French or Italian jurist. The competency of divorce is here regarded as universally regulated by domicile—and it is significant that in the same opinion doubts are indicated of the soundness of the judgment in *Niboyet v. Niboyet*, where divorce was accorded on something short of domicile. Granted that the dissolution of the married bond is in every moral and social aspect a matter of the first importance, surely the entering into it, in virtue of which only can any question as to its dissolution arise, is, *a fortiori*, a matter demanding legal regulation of at least as careful and severe a character. "The reason is, because the status of marriage extends its influence through and among all the rights and all the interests of the State. It is not limited to a mercantile right or a maritime right, pertaining to any one interest or occupation, but it reaches all." These sentences are Mr. Bishop's, used (ii. sec. 120) when pleading for jurisdiction in divorce *ratione domicilii* only. *Mutato nomine*,—without the alteration of a word,—they may be read in support of the domicile as regulative of the constitution as well as of the dissolution of the status.

That the whole of this province of international relations is in an unsatisfactory condition, is admitted by jurists of every school, who all join with equal voice in the cry for uniformity of practice. While fully acknowledging that the imperfections and complications of human affairs will permit no theory to be carried into practice in its naked logical strictness; that progress in international jurisprudence, as in politics, must be tentative and gradual, and can by no means march on the high *à priori* road to its goal, I have tried to argue that the consistent application of the principle of the ubiquity of the personal law of the domicile to matrimonial capacity, as to all other matters of status, is the course which bids best to secure a uniform and workable criterion. Of the two ablest advocates of the *lex loci* principle—Lord Fraser and Mr. Bishop—

the former, apparently oblivious of what he had previously written, virtually limits himself to a dogmatic statement of the rule, on the ground of convenience, without discussion of the arguments on either side ; while the latter, who ignores continental jurisprudence altogether, is so intent on dealing swashing blows at his adversary, as to forget that, while the sharp sword of his argument is dividing the web of his opponent's reasoning with one edge, it is at the same time committing equal havoc on his own with the other.

Since writing the above, an article has come under my notice in the last number of the *American Law Review*, by a writer whose name frequently appears to contributions on international marriage law,—Mr. Hugh Weightman,—in which, on the text of a case (*Thorp v. Thorp*, Jan. 7, 1883) parallel in circumstances to *Van Voorhis v. Brintnall*, and decided by the New York Court of Appeals on the same grounds, and after a review of precedents, English and American, he comes to the conclusions stated in the following propositions:—
 “I. That while the *lex loci* governs in questions of form as [? or] ceremony, the *lex domicilii* determines the capacity of the parties to enter into the marriage contract whereupon to found a *status* to be executed at home. II. That where the domicile of the contracting parties is different, the *lex domicilii* will decide in favour of its own citizen. And *e converso*, where the marriage is forbidden by the *lex domicilii*, the disability will be insisted upon by the *lex domicilii* of its own citizen, though inoperative in the *lex loci*.” This statement of doctrine does not carry out the principle to its full logical conclusion, and the phraseology is a little awkward ; but it only professes to proceed on the authorities which he has cited. The first member of the second proposition is apparently based on the second *Sottomayor* case, and the latter on *Brook*. This is, however, a recognition by an American writer of the principle for which I contend.

EFFECT OF DIVORCE AND NULLITY OF MARRIAGE ON CHARACTER OF LEGATEE AS HUSBAND OR WIFE

IN the matter of divorce, so far as numbers are concerned, we have not as yet advanced quite as far as some of the American States, New Hampshire, for example, where divorces are to marriages in the ratio of 1 to 9 ; but we seem to be rapidly making up our leeway. The prevalence of infidelity to the marriage vow is curiously instanced by the cases which are turning up in the Courts, where the question to be settled regarding the claim to a legacy is one which has been solely caused by the occurrence of a divorce. The wills were made some time ago, and the succession has opened now. There is something appalling in the idea of making a provision in an antenuptial contract of marriage for the patrimonial rights of the spouses in the event of their being divorced, and it

would be awkward for a conveyancer to have to explain to the parties the meaning and effect of the clauses. In the forms of settlement in Wolstenholme and Turner on *The Settled Land Act*, p. 90, there is a clause which, the authors explain in a footnote, is intended to provide for the event of a divorce. As matters stand, if clauses providing for such an event were ordinarily introduced into marriage contracts, a good deal of litigation would be saved; but if it were incumbent to provide for such a case, we suspect that the provisions made would sometimes be of a different character from what they actually are. In *Johnstone-Beattie v. Johnstone*, 5th Feb. 1867, 5 M.P. 340, it was held that the father of the erring husband had, under the marriage contract, to pay during the son's lifetime a provision which *in terminis* was to take effect on the son's death; divorce, according to Scottish law, operating just as death in regard not only to legal but to conventional rights, and even against a person other than the spouse, who is a party to a deed made *intuitu matrimonii*. In such a case we suspect the third party, if his attention were called to the possibility of such a result, would have the provision of the deed differently framed.

In looking over the April number of the English Law Reports, we find one case where the question was as to the effect of the occurrence of a divorce upon the description of a legatee, a divorce being a contingency evidently overlooked by the testator; and in looking into the Weekly Notes of April 7 we find another case of the same kind. In the first of these cases, *Bulmore v. Wynter*, 23rd Feb. 1883, L. R. 22, Ch. D. 619, under a will the income of the residue was to go to testator's daughter for her separate use independent of any husband, and after her death to "any husband with whom she might intermarry, if he should survive her," for his life. The daughter married after her father's death, was divorced, her husband married again, and thereafter she died. On her death the man to whom she had been married claimed the annual sum, and Mr. Justice Fry held his claim good. The claimant answered the description, "any husband with whom she may intermarry, if he survives her;" he had intermarried with her, and he survived her. It was contended against the claim that the person favoured must survive her as her husband—must be her husband at the time when the bequest to him was to come into operation. But the learned judge said he found no such words nor any expression of such an intention in the will. The reason of there being no express words to that effect in the will is very clear, for, as the learned judge proceeded to say, no doubt the testator did not contemplate the events which have happened. In opposition to the view of the learned judge, it may fairly be contended that the result is obtained by separating the two elements of the description, the character as husband and the circumstance of survivance, and holding it sufficient if the claimant answered first the one part of the descrip-

tion and then the other, while the words of the description ought to be taken as a whole. Suppose the words had been slightly different—suppose it had been said to “her surviving husband.” Could it be said that in any ordinary, plain, natural meaning of the words, a man who was not her husband at the date of her death, and who indeed was the husband of another woman, was her surviving husband? He never combined the characters of husband and survivor. Were not the words actually used, “any husband with whom she may intermarry, if he survives her,” intended to mean the same thing as “surviving husband,” and was it not a mere accident that the one form of expression was used instead of the other? To suppose that the words used were intended to mean something different from “her surviving husband,” would be to hold that they were intended to cover the case of the wife being divorced, and for that matter of the husband being divorced; and there is no probability, hardly a possibility, of such an intention being entertained. The case suggests several curious inquiries. Suppose the husband had been divorced, which in England can only be for adultery, combined with cruelty, or desertion, and so on. According to Mr. Justice Fry’s interpretation, the man would have equally been entitled to the annual income; he answered the words of the description (and that is all that the learned judge goes upon); he was a person who had intermarried with the daughter, and he had survived her. This is a result which certainly was never intended by any parent in making his will. Or, to take another case, suppose this daughter after being divorced had married again, and her husband survived her without divorcing or being divorced. There would be two persons claiming as husband, and as having survived—two Kings of Brentford smelling at one rose. Who would be entitled to succeed, the man who had been her husband, but was not so when the bequest came into operation, or the man who was her husband at that time? The latter, equally as the former, would answer the description of “husband with whom she may intermarry,” and of the description of “survivor.” The second husband would, we should say, be preferred, because he combined the two descriptions at the same time. But if the second husband is to be preferred, and there is no other reason than this for preferring him, this shows it is necessary to combine the two parts of the description at the same time; in which view the husband in the actual case where there was no plurality of husbands was not entitled. Or, to take another case, which is possible enough (and possibility is all that is required for the purpose of the argument), without assuming the lady to be as partial to marriages and divorces as the Thelesina of Martial’s epigram; suppose the lady married again, was divorced again, and the second husband survived her. The first husband and the second husband equally answer the description in Mr. Justice Fry’s reading of it. Both cannot get the legacy, and there

is no consideration suggesting a preference to the one over the other. The description of the person called to succeed on the daughter's death, which was intended by the testator, must have been one not applicable to more than one individual; and it may be applicable to more than one individual, unless you take it in what we cannot help thinking the natural meaning, the person who is the husband at the date of the death. The case of the woman marrying again and being survived by the second husband did occur to Mr. Justice Fry, but all he says about it is, "It does not seem to be right to give so much weight to the possibility of such a contingency as to overrule what appears, in my opinion, to be the plain meaning of the will." But it is necessary to take into account the possibility of such a contingency, because the words which are to be construed in the case which has happened are the same as those which would have to be construed in a case that might happen, and a meaning put upon the words which may suffice, or at least to pass muster, for the purposes of the present case, but would be utterly unsatisfactory, and indeed altogether inapplicable in another and possible case, cannot be the true meaning. The meaning that is put upon the words now must be one that will stand all round.

The other recent case to which we made reference is *Knox v. Wells*, April 3, 1883, 31 W. R. 553. The case is not one of the class to which *Bulmore v. Wynter* belongs, in which the legacy is to a character simply, no particular individual being mentioned or contemplated. It belongs to the class in which the legacy is to an individual mentioned by name, and a description as "husband," "wife," and so on is added. Such addition is sometimes merely designative; sometimes, as we take to have been the case in *Knox's* case, expressive of the character in which the legacy is given. In this case of *Knox v. Wells*, by a will made before the Divorce Act of 1857, and so at a time when a divorce could not be obtained except by special Act of Parliament, the testator directed his trustees to pay to his son George and his wife Eliza the annual sum of £150 jointly, declaring that on the death of the son George "leaving his wife Eliza surviving him," then "to her the said Eliza," the annual sum of £50 "so long as she continues unmarried." After the testator's death, the marriage was dissolved by the wife's adultery. On the death of the son George, Eliza claimed the £50 per annum. She had not married again. Against her it was contended that the words "so long as she continues unmarried" meant the same as if it had been said "during her widowhood," and she was not the son's widow, because to have that title she must have been his wife at the date of his death. Vice-Chancellor Bacon held the claimant entitled to the annuity. It was left, said the learned judge, to a person designated by the name of Eliza Wells, and the applicant is clearly that person. It was to go to her so long as she continued

unmarried, and she was unmarried. The learned judge treats of this case as if it were not a case of a bequest in a particular character at all. There is no doubt that this is the person pointed out, and she satisfies the condition necessary to the enjoyment of the annuity by remaining unmarried. The designation as wife is not considered as of any importance: an error in that would only be an error in the description. If you regard the designation of "wife" as only a description, of course an error in that would not affect the bequest any more than an error in stating the number of the street where the legatee was said to live, provided the identity were sufficiently established otherwise, as it is here. It appears to us that in a provision to a wife by the father of her husband, made among a number of other family provisions, the character as wife is of the very essence of the matter. It is not a mere description; it denotes the motive of the bounty.

When the first part of the provision, the life interest provision of £150 to "my son George and his wife jointly," was before Vice-Chancellor Page Wood in a previous action, *Knox v. Wells*, 1864, 13 W. R. 228, the motive of making the gift and the circumstance that the gift was by a father-in-law were not disregarded. After being divorced, the wife claimed part of the £150. Vice-Chancellor Wood refused the claim. In that case also there was a gift to a person designated by the name of Eliza Wells, and the applicant was clearly that person. Yet this was not held sufficient, and for the very good reason that the marriage had been dissolved by divorce, and on account of the wife's fault. It seems incongruous that she should be held not entitled to any part of a provision destined to her as the wife jointly with the husband, and be held entitled to a provision also destined to her as the wife. It appears to us, that in regard to the annuity claimed in the present case, it is clear that what the testator intended was to make a provision for his son's wife during her widowhood, and that he by no means intended to make a provision for a woman who had ceased to be the son's wife because of her unfaithfulness to him. Suppose after being divorced she had married again, and the second husband died before the husband George Wells, according to Vice-Chancellor Bacon's mode of interpretation, the applicant would be entitled to the annuity. She would be the person designated by the name of Eliza, there would be no doubt about her identity, and she was unmarried at the time when the annuity was to come into operation, the son George's death. Surely the testator did not intend to give an annuity which was to terminate if she ceased to be the son's widow, but was to be enjoyed although she was the widow of another man. Nay, she would be entitled although *married* at George's death, at least according to *Rishton v. Cobb*, where the condition "so long as she remains unmarried" was held satisfied, although the lady was married at date of will.

The annuity was to terminate if the woman married again, and so, according to the Vice-Chancellor's view, the testator regarded a remarriage as so great an offence, or rather perhaps as so great an alteration of circumstances, as to justify the withdrawal of the annuity, and the commission of adultery as so trivial an incident as not to affect the right to it.

Another recent case, where the question whether the description of the legatee applied to the person claiming the legacy, arose from the occurrence of a contingency not contemplated—not a divorce, but a decree of nullity of marriage—is that of *In re Boddington, Boddington v. Claimant*, L. R. 22, Ch. D. 597. The testator directed his trustees “to pay to my said wife, E. C. B., within one month after my decease, a legacy of £200, and in addition to pay to my said wife, so long as she shall continue my widow and unmarried,” an annuity of £300, “commencing from the date of my decease, or otherwise, in lieu and substitution of the said annuity, at the option of my said wife if she shall prefer it, a legacy of £2000.” “The provision hereby made for my said wife” was declared to be in satisfaction of any dower or thirds she might be entitled to claim. The wife, after the date of the will, obtained a decree of nullity of marriage on account of the husband's impotency. The testator died without altering his will. The lady claimed the legacy of £200 and the legacy of £2000, preferring that to the annuity. Mr. Justice Fry held her entitled to the legacy of £200, but not to the legacy of £2000. As regards the former the learned judge observed: “There is no doubt about the identity of the person, and the maxim, *veritas demonstrationis tollit errorem nominis*, would apply, and she is *prima facie* entitled to the legacy of £200, “although she is described as the testator's wife, which she was not at the time of his death, and in law never had been.” The learned judge held that the principle which applied was that laid down by Lord Alvanley in *Kennell v. Abbott*, 4 Ves. 809, and adopted by Lord Cottenham in *Rishton v. Cobb*, 5 My. and Cr. 145, that in order to make a legacy void which is given to a person in a particular character, the character must have been falsely assumed, and must alone be supposed to be the motive of the testator's bounty. Whether this rule is not too stringent, or, indeed, whether this has ever been laid down as embodying the only circumstances which will make void a legacy in a particular character, whether the concurrence of both these circumstances is requisite to void a legacy, we shall presently consider. In this case certainly the first requisite was wanting. The character of wife was not falsely assumed by the claimant of the legacy. “The testator had gone through the ceremony of marriage with her. It was no act or default on her part which rendered the marriage invalid. The ground of invalidity was a default on his part, not on hers.” As for the other element, the particular character being one which it must be supposed to be the sole motive of the testator's bounty, it

would not be necessary to consider whether this was possessed if the concurrence of both elements is requisite. We do not think, however, that the concurrence of both elements is required. There may be other circumstances than the false assumption of a character which may render the legacy void. We should say that it is enough if it appears that but for the supposed character the gift would not have been made. Certainly Lord Alvanley, in the case cited, did not lay down the rule so broadly as is represented. The testatrix had married a man who had a wife living, and who falsely represented himself as single. She left a legacy to him as her husband. Lord Alvanley said: "Upon general principles I am of opinion it would be a violation of every rule that ought to prevail as to the intention of a deceased person, if I should permit a man availing himself of that character of husband of the testatrix, and to whom in that character the legacy is given, to take any part of the estate of a person whom he so grossly abused, and who must be taken to have acted upon the duty imposed upon her in that relative character. . . . Under these circumstances, I am warranted in making a precedent, and to determine that wherever a legacy is given to a person under a particular character which he has falsely assumed, and which alone can be supposed to be the motive of the bounty, the law will not permit him to avail himself of it, and therefore he cannot demand his legacy." In short, the two circumstances of false assumption of a character, and of the character being the sole motive of the bounty, were sufficient to render the legacy invalid; but it was not said or implied that these were the only circumstances where that result would follow.

It is in this sense that the opinion was understood by Lord Lyndhurst in the case of *Allen v. M'Pherson*, 1 Ph. 133. His Lordship said as to *Kennell v. Abbott*, "A fraud had been practised, and the question was one of intention. The testatrix intended the legacy for her husband. The legatee had fraudulently assumed that character. The Master of the Rolls came to the conclusion that the character he had assumed was the only motive for the gift. The law, therefore, he said, would not permit him to avail himself of the testator's bounty." Against the claim in this case of *Boddington*, it was argued that the bequest was given for a particular purpose and intention, viz. to discharge the moral obligation which a man owes to his wife, and this particular purpose was shown by the declaration that the provision was in lieu of any dower or thirds. The Court held that this was not a declaration of a particular purpose, but a direction that the legatee should take nothing but the legacy. It seems to us that, independent of this declaration, it is clear enough that the legacy was intended for the particular purpose and intention mentioned. But the failure of the character, and the consequent removal of the motive involved with it, does not necessarily involve the failure of the legacy. There may be another motive, as, for

example, in the case figured by Lord Alvanley in his remarks in *Kennell v. Abbott*, where a legacy is left to a person described as the testator's son, and it turns out that the testator had been imposed upon, but not by the supposed son. In such a case the legacy would not necessarily fall, because there might be motives of personal affection and attachment. In *Boddington's* case the natural supposition that the gift was only in the character of wife, and that the possession of that character was the motive of the bounty, is met by the consideration that the testator did not alter his will after the lady ceased to possess that character, and that a sufficient substitute for the original motive of marital affection and marital obligation may be found in the moral obligation to repair the wrong done to the lady in placing her in a false position. To this it might be answered that the testator in his lifetime did make a provision for the lady, inspired by the latter motive. The lady granted an acknowledgment that all the arrangements entered into on the part of the husband and herself to take effect upon the decree *nisi* for nullity of marriage being made absolute had been carried out, and in fulfilment of such arrangements she had received £6000 deposited by him as a provision to be made for her, consequent on the decree being made absolute. Mr. Justice Fry did not think this operated as a satisfaction of the legacy, the legacy and the provision being made from different motives and for a different purpose. This may be so, but the circumstance of such a provision being made seems an answer to the argument suggested, that a sufficient motive for the bequest, in substitution for the original motive, may be found in the desire to provide for the lady whom the testator had wronged by putting her in a false position. This question of satisfaction or ademption it is scarcely pertinent to our present purpose to enter into.

As regards the legacy of £2000, a different decision was arrived at by Mr. Justice Fry, and the legatee was held not entitled to that. It seems strange that she should have been entitled to the gift of £200 destined "to my wife E. C. B." after the testator's decease, and not entitled to the gift of £2000 destined to her in the same character to "my said wife" after his decease. The reasons given for the distinction are these. The legacy of £2000 being given in lieu of the annuity, if she was not entitled to the annuity she was not entitled to the £2000. No doubt, if she was not entitled to take the annuity she was not entitled to take the legacy, because the right to either was dependent on the same circumstance, viz. whether she could be regarded as answering the description in the settlement, "my said wife." But the right to the latter was not dependent upon her right to the former. She had a perfect option to select the one or the other. Her right to claim the £2000 was just as full as if nothing had been said about the annuity. The statement about "in lieu of" the annuity was merely meant to show that she was not entitled to both the

annuity and the legacy. The annuity was saddled with the condition that she was to receive it only "so long as she shall continue my widow and unmarried." The legacy had no such burden. But a condition as to the continuance of enjoyment of the annuity has nothing to do with the right to claim it or a legacy given alternatively. Proceeding on the assumption that the legacy was only in lieu of the annuity, and the right to take it was dependent on the right to take the annuity, the learned judge reasons thus: "It appears to me that the annuity is given to her for a period [so long as she shall continue my widow and unmarried] which can never come into existence. She never was the testator's widow, and therefore she can never continue his widow for any length of time. On principle, therefore, I am unable to see how an annuity for a non-existing period can possibly be claimed." Of course, if she never was his widow, she could not continue his widow for any length of time. But why was she never his widow? Because she never was his wife. But why then, if she never was his wife, hold her entitled to the first legacy given to her in the character of his wife? Why give her the one legacy and deny her the other, when both are given in the same character? The learned judge errs, first, in thinking the right to the legacy of £2000 was dependent upon the right to the annuity, instead of seeing that the two were independent of each other, although dependent upon the same thing; and secondly, in not seeing that the objection stated to the right to the second bequest is essentially one which equally applies to the first bequest, that of the £200, and which, rightly or wrongly, he had already found to be insufficient in regard to it.

There are many curious and interesting cases as to the circumstances in which the failure of the character or description of a legatee affects the right to a legacy, which we shall consider in our next number.

D. C.

GOSSIP OF AN OLD FRENCH LAWYER.

SOMEHOW or other, the legal profession has always been considered as a fair butt for the wit of those who are jealous of its intellect, or envious of its gains. The familiar picture of a cow pulled by the horns by the pursuer, and held by the tail at the instance of the defender, while the "lawyer" quietly fills his pail with her milk, is one whose truth to nature has been maintained, sometimes in ignorant earnest, sometimes in conscious jest, by many writers and speakers in almost every age. But the fact that we readily forgive the satire, is the best proof of its want of application; and we are never slow to welcome a joke, even at our own expense, if it serve to stir a little of the dust which is too apt to gather in the "purlieus," where much of our work lies. Indeed, the very fact of dry-

ness and dustiness seems to provoke a thirst for fun, and we should not be far wrong in saying that our profession has been productive of a greater mass of humour and witticism than any other calling under the sun. Few people think of making jokes about architects, for instance, or bankers; and if these worthies do condescend to become facetious *inter se*, they are denied the publicity which has conferred immortality on repartees in open court.

Wit and humour are alike ephemeral, and subject to the changes of times and tastes. To the school-boy—even to Macaulay's school-boy—the witticisms recorded by Cicero or Macrobius appear extremely puerile, and much of the humour of antiquity is lost upon us. It is obvious that the ancients laughed at things which do not strike us as ludicrous, and it is also probable that they remained grave in situations where we should have found it difficult to do so. This inevitable change of sentiment applies, though with less force, to later times. The jokes of our Scotch ancestors, some centuries ago, are often silly and disagreeable, while their Acts of Parliament are very quaint reading, and are often quoted for the pure purpose of amusement. This warns us of a Nemesis which is hanging over us. Let us think of the time when posterity will go to sleep with *Punch* or *Pickwick* in its hands, and become convulsed with laughter over the *Pub. Gen. Statutes*, 1883. Truly, "He laughs best who laughs last."

But even when humour has lost its charm as such, it retains its value as the medium by which many little scraps and fragments of history and manners have been preserved to us. In reading the gossip of Ælian or Aulus Gellius, though the anecdotes may not be very pointed, or the philosophy very profound, a picturesqueness and familiar interest attaches to great names which does not necessarily follow from more ambitious efforts at biography. In the anecdotes of Sacchetti, we have a picture of his times which, however unflattering, we feel to be real and full of a local colouring which is rare in history. If we have any interest, then, in the former life of our profession, or if we care to glance for an idle moment at the lighter side of its daily work in past times, we shall find that humour has, here and there, preserved some such records for us; and has, let us hope, attained the unimpeachable result of "combining amusement with instruction."

Guillaume Bouchet, Sieur de Brocourt, was a bookseller of Poitiers, who also performed certain legal functions in that town, where he was born in 1526. This man wrote a book which is little known—and, perhaps, as little deserves to be known outside the circle of bibliomaniacs. It is a collection—of a somewhat childish and somewhat Rabelaisian character—of anecdotes and conversations about almost everything under the sun. Only one part of it, however, has any particular interest for us, and that is a chapter headed, "Des Juges, des Advocats, des Proces, et Plaideurs."

It is as well to say, at the outset, that the author adopts a tone

of caustic raillery almost throughout, so that it is difficult to gather the bent of his sober thoughts on any subject. The discussion, which is supposed to take place amid a circle of choice companions, commences in a manner by no means flattering to the legal profession. For almost the first inquiry proposed, is why Advocates should be so often called thieves! "When we call a Breton thief," one of the company remarks, "there is at least rhyme (*Breton, larron*), and when we call a miller, for instance, thief, there is reason; but when we call an Advocate thief there is neither rhyme nor reason." Another of the company gives an account of a case in which he had been pursuer. "I neither lost nor won," he says, "and the case is in suspense; for although I had received a good donation in proper and authentic form and signed by the donor, the opposite party alleged that he who had given it me was not 'wise enough,' nor in his proper senses; and this being so, that he could not dispose of his property, much less give it away, and that the law forbade a man who was not 'wise enough' to part with his goods by donation. Thereupon, I gave up hopes of my case, since we never find that a wise man will give away his property, besides the fact that there would be great difficulty in finding a man wise enough to judge whether he who had given me the gift was so, seeing that in the whole of Greece, as M. Bodin says, there were only seven wise men, and there is no evidence as to who judged them to be so." It is, perhaps, fortunate that such metaphysical litigants are rare in our day. The next story is told of a merchant who asked a painter to paint for him the picture of a horse lying on its back with its legs in the air. The artist painted the horse, but could not bring himself to depict it in such an absurd position. On delivery, the work of art was refused for this reason; but on the case coming before a judge he turned the picture upside down, and found the pursuer liable for the price. "If I had been that judge," says one of the company, "I should have made him pay double, for he had two pictures instead of one;"—a hint which might be taken by some of our Scotch artist friends, whose avoidance, by the bye, of the human form divine, has a suspicious connection with the fact that it does not look quite so well either way, and that its introduction thus narrows the possibilities of æsthetic gratification. Another story, even sillier than the last, gives rise to an interesting remark, namely, "that the office of a good magistrate is not to draw men into litigation or to foster it, but rather to keep them out of it by every means, as Cato Censorius properly declared, when it was proposed in the Senate to decorate the Court and auditorium of Rome, some proposing to construct galleries so as to keep the litigants under cover. Cato said it would be better to pave the courts and passages with pitfalls and man-traps, so as to keep people out of them as much as possible." We question whether the construction of such engines on the floor of the Parliament House would tend to decrease litigation on the

part of the public. "On the other hand," our author goes on to say, "when Marcellus, nephew of Augustus, was *Ædile*, he covered with fine cloth all the common place in order that those who came there to plead might be in shade. 'In which one can see,' says Pliny, 'what a change has taken place since the time of Cato.' But if these ancients could see the ornate chambers where, in our day, justice is administered, the paintings, the tableaux, and tapestries, they would remark a further change!" Judging from a recent ceremony in London, we may say that the public opinion of our day is with Marcellus, and not with Cato.

The discussion rambles in a quaint way from point to point of the subject under review, and here and there we find passages which have an interest as contributions to the oft-renewed questions of advocacy which have been such favourites with ancient and modern philosophers alike. "Does not every one know," it is said, "that, among persons of sound judgment, the fluent speaking and eloquence of a fallacious orator are of no more account than the *rouge* of a coquette with which she adorns her face to appear more fascinating? Does not every one know that this art is nothing more than a deceit and a tyranny of the understanding? Who does not know that the Spartans rejected this art, saying that the speech of good men came not from art, but from the heart; and that Socrates judged no orator to be worthy of honour in a republic, no plague being more hurtful to a country than a fair-speaking orator when he made a bad use of his art, and of the sweetness of speech?" "One would not find so many advocates abusing the art of eloquence," says another guest, "in order to conceal the truth, surprise the judges, or so dazzle them as to prevent their separating the just from the unjust, if the example of the Athenians was renewed, who, after judgment given,—and aware that an attempt had been made to beguile them,—addressed themselves to the advocates, and punished them rigorously. Even the Athenian Senate, the Areopagus, only permitted advocates simply to state the facts on either side, without using any embellishment to allure the judges. When the advocate was called, the usher forbade him to move the affections of the judges. And in order that the judges should not be diverted by any means from the truth, they heard criminal cases by night, and in darkness." This, and the passage which follows, give us very curious ideas of ancient and mediæval conceptions of justice. "The great King Francis was constrained to deprive accused persons of all assistance from counsel, seeing that their artifices only served to pervert justice. In all cases where there is a question of fact, the parties should be heard by word of mouth, as is done in the Merchant Courts." "All ordinances would be useless," said another, "if all advocates were imitators of the sanctity of Parpinian, who refused to defend his emperor, Caracalla, who was accused by the senate of having massacred Geta his brother. But now-a-days manners are so corrupt,

says François Grimaudet, that there is no murderer, thief, brigand, or robber, of whatever condition, or however wicked, who will not find, provided he has the money, an advocate who will boldly undertake to plead his cause. And if he cannot make it a good one, he will make it last so long, that one may despair of seeing the end of it." As a salutary warning to the profession the following anecdote is introduced: "A certain advocate of Milan was so cunning that he could make his cases last as long as he liked. Galeazzo, Duke of Milan, hearing of this, called the advocate to him, and said that he owed a thousand crowns to his baker, and wished to avoid paying him just then. The advocate assured him that he need not trouble himself about it for ten years to come, as the case would last all that time. The ungrateful Duke, when he came to know the artifices of his counsel, at once ordered the advocate to be hanged."

On the subject of oaths, solemn though it be, our author has some caustic remarks to make. There is the story of the man who held up his left hand, and, on being corrected by the judge, replied, "It is all the same, Monsieur; I swear equally well with either." A smattering of learning follows, to the effect that the ancient Flamens were not required to swear, and that priests had been for a long time exempt. "Even in our day," it is added, "the clergy do not swear on the Gospels, and have an oath different from the common form; for they place the hand *ad pectus*, which was called in old French *au py*. The reason of all this is and was," he continues, very sensibly, "that it is absurd to doubt the faith of those to whose hands we have confided all divine things." The great value of an oath is shown by the fact that by its means Henry of England cleared himself of the murder of the Archbishop of Canterbury, Charles VII. of the death of the Duke of Burgundy, Pope Marcellius of the accusation of idolatry, etc.

Again the desultory conversation reverts to the office of advocate, and with no diminution of the satire. "Escoutez qu'il arriva à un avocat és grands Jours de Poitiers; c'est que se complaignant devant messieurs d'une partie qui ne luy vouloit pas communiquer une pièce, commença à dire, '*Malum est quod tegitur.*' Le President luy va dire, 'Couvrez-nous, donc, avocat.'" That the epithet "larron" was a common one as applied to certain counsel by the *profanum vulgus*, and more especially by disappointed litigants, is evident if we can trust the reported evidence of an advocate of Poitou, who says, "even in the *palais*, while we are going out, they call us *larrons* in our presence, for there are stationed in that place haberdashers and carriers of baskets, who sell laces, bands, and ribbons of all kinds; and when they see us coming out they cry, '*A mes las ronds, à mes beaux las ronds!*' and we must endure it, though we know that they are speaking of us."

It is only natural that in the course of the discussion,—if we can dignify this old-world gossip by the name,—that the freaks and subtleties of the law itself should come under notice, as well

as the foibles of its professors. Accordingly, a number of instances are given of insoluble problems suddenly presenting themselves where all seemed plain and easy, of some of those inextricable complications which, when they occur, recall the lines of Charleval on the conduct of life :

" Avant qu'en savoir les lois
La clarté nous est ravie ;
Il faudroit vivre deux fois
Pour bien conduire sa vie."

There was a law in a certain country, according to Bodin, which decreed that he who provoked a sedition should be punished with death, and he who appeased a tumult of that kind should receive 500 crowns. No doubt was entertained as to the wisdom or sufficiency of these provisions until it occurred that a certain citizen, after having stirred up a seditious tumult, became himself the peace-maker, and restored order. Here was a difficulty ! On the one side it was argued that the 500 crowns were clearly due, as more weight should be given to his good action in calming the revolt, than to his misdemeanour in raising it. The magistrates, however, entertained no such moral distinctions, but proceeded on the stern lines of fact. He had raised the sedition first, and appeased it afterwards. Let him be hanged, then, first, and when that is done, the reward will be paid on his applying for it. Another difficulty cited is that in which Augustus was placed, he having published a reward of 25,000 crowns to the person who should bring him the head of Crocatas, the Spanish robber. Crocatas brought it himself—and was presented with the reward, and pardoned.

But the reader may think that he has now had enough of the *Sieur Brocourt* and his pleasantries, which, like the "motti" and "burle" of the Italians of the preceding age, are apt to pall on the modern taste. But the glimpse which he gives us of his place and time is not without its value. He brings to our view the old town of Poitiers, with its quaint and not uncultivated society ; we hear murmurs of the law's delay mingled with praises of the prompt justice done by the *Consuls des Marchands* ; we see the motley crowd of peasants and citizens moving through a maze of daily circumstance which has found no other place in the memory of the world. Through all this turmoil there move the figures of judge and advocate, the one dignifying his natural shrewdness by a somewhat florid learning ; the other, if these tales be true, sometimes endangering the reputation of his calling. But we should be glad to believe that this latter catastrophe had not so much existence in fact as in the grotesque imagination and quaint humours with which *Guillaume Bouchet* enlivened the select society of Poitiers some three hundred years ago.

D. J. M.

NOTES IN THE INNER HOUSE.

WE note, in the first place, one or two consistorial cases.

In *Young v. Young* (Second Division), November 16, 1882, it was held that an action for desertion could not be maintained when the defender had been sentenced to penal servitude prior to the expiry of the period of four years. The Lord Ordinary assumed that the defender was in a course of wilful non-adherence when his conviction took place; but held that "this wilful non-adherence must be continued during the whole period of four years, and if during a part of that period the absence has been compulsory," it could not be termed wilful. To this judgment the Inner House adhered.

In *Collins v. Collins* (Second Division), December 1, 1882, the important question was raised whether condonation of adultery can be conditional. In the law of England there is the authority of Dr. Lushington for holding that it can. With him concurs Lord Fraser, who, in expounding our own law, says, "It was a matter entirely within the power of the innocent spouse to condone the offence, or to insist for the remedy which the law allowed—separation or divorce; and being entirely within his right, the Lord Ordinary is of opinion that he was entitled to adject a reasonable condition to his condonation." In the Inner House, however, a different view was taken. Lord Young was of opinion that condonation was absolute. "If it is fitting that I should consider the reason and policy or public utility of our rule as we have certainly heretofore regarded it, I must say that I think it is well founded on those considerations. It is, in my judgment, unfitting, on public or moral grounds, that a man should knowingly take an adulterous wife back to his bed on any other footing than absolute forgiveness of the past." While of opinion that past transgressions, though condoned, "may be used in evidence of a subsequent transgression as throwing light on the facts relied on to prove it," he could not assent to the proposition that something short of subsequent adultery might warrant decree of divorce. "To hold this would be to hold that a man who knowingly and forgivingly resumes cohabitation with an adulterous wife may thereafter have her divorced for imprudence or levity of conduct, that being in law the condition of their cohabitation." He was further of opinion that condonation could not be made conditional by paction. "The true view, I think, is that forgiving and resuming cohabitation with a guilty wife is not a mere private affair, but one of some public concern, and so not subject to such practical conditions and terms as people may lawfully make in their private personal dealings. The public law of marriage and of the married relation is concerned." In these views the other learned judges concurred.

In *Poe v. Paterson* (First Division), December 13, 1882, the

question for consideration was, whether the sixth section of the "Married Women's Property Act, 1881," applied to marriages contracted before as well as after its date. Lord Fraser, with reluctance, "held that it had only effect in the case of marriages subsequent to 1881." This sixth section confers upon the husband in the event of his wife's death the same right in her moveable estate as is enjoyed by a widow over the personal estate of her husband. The ground of Lord Fraser's opinion was sub-section two of section three, which, dealing with marriages prior to the date of the Act, declares that its provisions shall not apply except to a limited extent. The simple question for decision was, What is meant by "the provisions of this Act"—all the provisions, or those merely preceding section 3, being contained in sections 1 and 2, and to which the title and preamble are peculiarly applicable? The Court of Session have reversed the Lord Ordinary, and have read these words as tantamount to "the foregoing provisions," considering Lord Fraser's reading as too literal, and calculated to lead to anomalies.

Smith & Co. v. Taylor, and Paterson, Cameron, & Co. (First Division), December 8, 1882, is a decision of no small importance to law agents. It raises the question whether an agent is conjunctly or severally liable along with his client for damages arising out of diligence executed without proper warrant. The agents here had presented a petition for *cessio* following upon an inept charge, and the Court held that this amounted to wrongous use of diligence, warranting an issue in an action of damages without averring malice or want of probable cause against either agents or client. The Lord Ordinary (Fraser) threw out the case as laid against the agents. In his opinion "the client is responsible for the agents' proceeding, and for the blunder which was committed by the messenger or officer who gave the charge, but no action lies directly at the instance of the party injured against the agents for any damage which the pursuers may have suffered. The client is liable in damages to the third party injured, but not the agent who carries out his orders. If the client be found liable, he may have his right of recourse of relief against his agent, but to this extent and no more is the agent liable." This view of the law appears to be supported to some extent by Lord Deas, who says, "I should, on the whole, have been better satisfied had your Lordships held that as against the agents it was necessary to put in issue malice and want of probable cause." But the Lord President said: "I do not know that it was ever held that when the injury founded on is the wrongous use of diligence, the agent who makes the blunder by which the injury is suffered is not answerable for it as well as the client." He distinguishes between this case and that of *Kinnes*, 19 *Scot. Law Report*. p. 78, in which the Court had found it necessary to have an averment of malice and want of probable cause in an issue relative to the agents. That case arose out of a

process of sequestration, which had been recalled by the Court because of a defect in the affidavit. "We were all of opinion that it was necessary for the pursuer to allege malice and want of probable cause, for we held the petition for sequestration to have been a judicial proceeding and nothing else." Lord Shand said: "I think if an agent, acting for a client, orders the execution of a diligence without any proper warrant, or performs any other wrongful act, resulting in injury to a third party, the agent as well as his client is responsible for the injury done." The term "wrongfully" alone was therefore held sufficient for the issue.

All cases which throw light upon the subject of triennial prescription are of importance. In *Mitchell v. Moultrys* (Second Division), December 16, 1882, the Court have decided that it is not competent to refer the resting owing of a debt incurred by a wife after marriage to her oath. "I am not disposed," said Lord Young, "to doubt that the reference to the wife's oath was competent to prove the constitution of the debt. But the question of resting owing is different; and if the husband is still to be made liable, the question of whether there has been payment or not must be referred to his oath, not his wife's. Although on the doctrine of *præpositura* the constitution of a debt may competently be referred to the oath of the wife, and, I assume in the present case, is to that extent competent, yet on her failure to state that the debt has been paid, I know of no principle or authority for holding that a debt which the husband himself may have paid is still resting owing." The Court further held that a letter which contained no reference to "any account or debt at all," although "such a letter as might be written by a married woman called upon to pay a debt incurred before her marriage," was not proof by writ of the constitution and resting owing of the debt. They distinguished between this case and that of *Fiske*, 22 D. 1488, in which there was a letter containing the words "my debt."

In *Cunningham v. Black* (First Division), January 9, 1883, the question of the competency of an appeal arose under the following circumstances. The action was one at the instance of a landlord to have his tenant ordained to stock the subjects let, in order that he might have security for his rent. This rent was only £15 for the half-year, and the tenant objected to an appeal being taken, upon the ground of the insufficient value of the cause. But the Court held that the real value of the cause was not to be determined by the amount of rent, but that the prayer of the landlord's petition must be taken as a whole. Referring to it, the Lord President said: "We have here a distinct alternative offered to the defender; either he is to replenish the subjects which were displenished by the sale following on the sequestration, or, failing his so doing, he is to be removed, and warrant is to be granted to the pursuer to relet the premises. In this way the question is fairly raised whether or not there is a subsisting lease, and that, I

think, is the real question for determination in this case; not the narrower one of the defender's liability for a half-year's rent of the premises, but whether or not the landlord has a tenant, and if so, whether the tenant is bound by a five years' lease?" The case was indeed held to be ruled by that of *Drummond v. Hunter*, 7th March, 347.

Where an interlocutor of the Sheriff disposes of the whole merits of a cause and awards expenses, it becomes final after the lapse of six months from its date without appeal being taken. Such is the provision of the 67th section of the Court of Session Act of 1868. The mere fact that subsequently the case has been awakened in the Sheriff Court, and a decerniture for expenses pronounced, does not open the way for an appeal to the Court of Session. This is the import of the decision in *King v. Thomson & Co.* (First Division), January 19, 1883. "The circumstance," said the Lord President in deciding that case, "that there was a dispute between two agents as to how the expenses were to be divided, does not affect the parties to the suit, it is merely a side issue."

In *Mackay v. M'Cankie* (First Division), January 27, 1883, the Court have confirmed the doctrine that by the law of Scotland damages may be recovered for slander used to the pursuer alone.

In *Eastburne v. Cowan & Co.* (Second Division), February 8, 1883, the question whether it is competent to arrest property in the hands of the public prosecutor, he holding it for the purpose of production at a trial, was raised. But the judges carefully avoided answering it. The Lord Justice-Clerk came the nearest to giving such an answer. He said: "As to the person in whose custody the thing is for the ends of justice, I am inclined to think that no arrestment in his hands could bar him from returning it to its true owner, for he holds it under the primary obligation to return it to him. I am not prepared, however, to give an opinion on the general question."

A case in which the validity of a vote tendered in the course of a sequestration is brought up before the Supreme Court is now of rare occurrence. But in *Tytler v. Walker and Others* (First Division), February 28, 1883, we find such a case. Two brothers of the bankrupt claimed to vote upon promissory notes prior in date to the sequestration, but lodged by them more than a year after it had been awarded. The Lord Ordinary, making a wide distinction between the evidence required for voting and for drawing a dividend, repelled the objections taken to their votes, observing, "It may be quite proper that the trustee should require explanation as to circumstances in which they (the notes) were granted, but in the meantime, and in the absence of any ground of suspicion, they appear to me to be sufficient vouchers to support the vote." And upon the same ground, he accepted a promissory note granted by the bankrupt to his law agents, as evidence of a business account due to them but not produced. The Inner

House had no difficulty in reversing the decision, upon these points, of the Ordinary. With regard to the votes of the brothers, the Lord President was influenced to some extent by the fact of relationship. After pointing out that the promissory notes had not been discounted, and had lain in the hands of those who produced them, he goes on to say, "Now, when we consider that the payees are the brothers of the bankrupt, and that the notes were produced under such peculiar circumstances, it seems to me impossible to sustain this claim to vote." But Lord Deas was of opinion that relationship in itself is no valid objection, and the same vouchers which would be satisfactory in the case of strangers, "would, in my opinion, hold good in the case of relatives." This distinction which Lord Deas repudiates has, however, been repeatedly recognised. As to the law agent's claim, the Lord President remarked, "The proper voucher would have been the business account accompanied by the vouchers, though probably the account alone would have been enough in so far as it was for work done."

In *Fleming v. Jaffrey* (First Division), March 1, 1883, the Court refused to interfere with the discretion of a Sheriff who had granted *cessio*, when a dissatisfied creditor sought to have sequestration substituted instead.

In *M'Adie v. M'Adie's Executrix* (Second Division), March 9, 1883, the Court refused to look upon a docquet upon an account signed by the alleged debtor, but neither holograph of him nor tested, as a writing *in re mercatoria* proving the amount of the debt. Lord Rutherford Clark dissented, "on the ground that the account being, with the exception of certain items, such an account as might have been proved by parole, the acknowledgment produced was sufficient to prove it."

In *Chisholm v. Robertson* (First Division), March 10, 1883, we have another case relating to triennial prescription. Here the Court held that a transaction of loan in which blank forms were given out by a contractor and filled up by the hirer, rendered the claim of the former, one founded upon a written obligation, and consequently not subject to the triennial prescription. This case may be compared with that of the *North British Railway Co. v. Smith-Sligo*, 1 R. 309. There, however, it appears that the writing was upon one side only, that of the pursuers, and related to a limited period of time which did not embrace the items in the account alleged to be prescribed. Hence there is no inconsistency between sustaining the plea of prescription, as was done in that case, and rejecting it in *Chisholm v. Robertson*.

"CROMBIE'S MODERN ATHENIANS."¹

OUR excuse for bringing this interesting work under the notice of our readers, is the fact that about one-half of the portraits which it contains are those of Edinburgh lawyers. In this respect it reminds us of *Kay's Portraits*, to which, indeed, it may be considered as forming a sequel. The editor, Mr. William Scott-Douglas, craves our indulgence for his shortcomings in the biographical notices. We fear, however, that for some of these shortcomings no valid apology can be offered. Want of materials will not justify writing nonsense, or exhibiting bad taste in the observations made. What excuse can be offered for the following? "His dwelling-place, as far back as we can remember, and we think down to the date of his demise, was Boroughloch House, East Meadows, now incorporated with Melvin's brewing premises, *from which he latterly removed to No. 22 George Square.*"

George Square is, we all know, a very quiet, peaceful place, but it has not as yet been converted into a cemetery for the dead.

Again, in his notice of John Irvine of Bonshaw, advocate, an extraordinary figure, suggesting Falstaff dressed for a funeral, he says:—

"It may seem almost incredible, though altogether true, that the creeping figure of 'too solid flesh,' so sadly restricted in locomotion, seen in the left side of the print, was in former days Professor of Civil Law in the University of Edinburgh."

Whether incredible or not, it is certainly not true. *Alexander Irvine of Newton*, a distinguished lawyer, afterwards raised to the bench, was the professor with whom Mr. Douglas has carelessly confounded the subject of Mr. Crombie's caricature.

In his notice of Lord Murray, he says that he was born in 1788, and died at the age of eighty, consequently the date of his death must have been 1868. But from a footnote we learn that in 1865 Lord Murray had been dead for six years.

Mr. Douglas' taste is as defective as are his statements. Thus, again to refer to Irvine of Bonshaw, we find the following:—

"His death is announced in the obituary list of the *Scotsman* as having taken place 'at Edinburgh, on 18th June 1839,' and we suspect from the circumstance of no house address being given, that the unfortunate gentleman may have died in the Royal Infirmary."

The above, we presume, is intended for humour. Concerning Roger Aytoun, W.S., who was a keen Radical, he says:—

"When the reader is informed that this man was the father of William Edmonstoune Aytoun, author of *Lays of the Cavaliers*, and other works of the high Conservative type, he may form some

¹ A Series of Original Portraits of Memorable Citizens of Edinburgh, 1837 to 1847.

conception of young Aytoun's relief when the obituaries announced the death of old Roger, at the age of seventy-four, on 16th March 1843."

If Conservative politics lead to the extinction of natural affection, it is devoutly to be hoped that the national instincts will continue to be Liberal.

It is a relief to turn from the letterpress to the plates, which, we trust, form more accurate representations. The lawyer will view with interest the portraits of men with whose names at least we are all familiar. As artistic productions they have, we think, greater merit than those of Kay; but they lack that quaintness which so delights us in his works.

The first two Senators of the College of Justice who appear before us in this gallery are Lords Cunninghame and Gillies. The former reminds one of the late Mr. Hill Burton, a resemblance suggested both by the features and the costume. The latter is a striking-looking figure, with his grey beaver hat, blue tight-fitting breeches, and black gaiters. Both are armed with umbrellas of the kind which Dickens has immortalized in his character of Mrs. Gamp. Judging from the frequency with which such articles appear in these cartoons, they must have been fashionable forty years ago. The countenance of Lord Gillies is homely, but wonderfully expressive. Then we have Henry Cockburn, a neat, dapper-looking gentleman, with swallow-tail coat and blue trousers, seals dangling from his waistcoat, and a thick stick in his hand. Opposite to him is the huge, unwieldy figure of Adam Duff, Sheriff of Midlothian for twenty-one years. "The careless exterior and slovenly gait of the plain-featured, though very amiable sheriff," says Mr. Douglas, "stand out here like a foil against the finely-chiselled face and firm-set figure of the accomplished Court of Session judge." Upon another page we find an excited-looking old gentleman in a blue surtout with huge velvet collar, who is being contemplated by another dressed in grey, with checked neckcloth. These turn out to be respectively Patrick Robertson and John Hope. Lords Jeffrey and Murray, who form the next couple, were of one mind in their politics; but they certainly must have contrasted strikingly in their physical appearance. The heavy-featured gentleman in a brown coat, dark blue waistcoat, and light blue trousers, with a cane ornamented by tassels in his hand, is Lord Dundrennan. He confronts the tall lean figure of Adam Anderson, clothed entirely in black, which reminds us of that of a later judge, Lord Benholm. Anderson had a very short term of judicial office, dying within a year of his elevation to the bench. Lord Benholm himself is to be found amongst these portraits, and the likeness will strike even those who only knew him at a much later period of his life. The only other Senators who appear as "Modern Athenians" are Duncan M'Neill and Sir James Moncreiff. The latter bears a startling resemblance to a clergy-

man, as if he had clung to the paternal garb. The portrait of Lord Colonsay will suggest but little to the present generation.

Other lawyers are also represented by these plates who did not attain to the dignity of the bench. Here is Robert Thomson,—“Thomson on Bills,”—with his head thrown back, a blue swallow-tail coat buttoned in front, and a riding whip in his hand. Behind walks Robert Hunter, who lived to be the last of a race of old-school lawyers, a courteous though somewhat pedantic old gentleman, leaving this earthly scene so lately as 1871. Here is Robert Forsyth, with the legs of a bishop, and a powdered pigtail peering below his hat—Forsyth, who dictated materials for a quarto volume daily, and wrote his *Beauties of Scotland* without ever leaving his own fireside, a legal and literary hack for the most part, yet not devoid of philosophy. Writers upon law are certainly not wanting, for we have John Shank More and George Joseph Bell. A wider range of literature has its representatives in William Edmonstone Aytoun and John Wilson. The former has the garb of a wedding-guest, white trousers, lavender gloves and tie. He is using an eye-glass with one hand, as if inspecting a Whig or a Puritan, while in the other a roll of MS. marks the man of letters. John Wilson is an untidy-looking person, who seems to be contemplating with an almost angry expression the meek little George Joseph Bell, who forms the companion portrait.

We find also a collection of Writers to the Signet, amongst whom looms out the gigantic figure of Sir James Gibson-Craig in his top-boots. A portrait of this gentleman by the late Gilbert Scott-Moncrieff of Fossaway will be found in *The Scottish Bar Fifty Years Ago*.

Review.

A Digest of the Law of Criminal Procedure in Indictable Offences.
By Sir JAMES FITZJAMES STEPHEN, K.C.S.I., D.C.L., a Judge of the High Court of Justice, Q. B. Division; and HERBERT STEPHEN, LL.M., Barrister of the Inner Temple. Macmillan & Co. 1883.

THIS, like all other productions from the pen of Sir James Stephen, is a model of clearness, simplicity of arrangement, and conciseness. Within little more than 200 pages of well-leaded, readable type, space being taken up on every page by clear, unclouded headings of paragraphs, the authors have succeeded in supplying the fullest and most definite information on almost every conceivable point that can arise in procedure for indictable offences. All argument is avoided, as it ought to be avoided in such a work. Everything is laid down in the form of distinct, unembellished proposition,

everything in the way of style, except clearness of statement, being sacrificed to brevity. The student or practitioner who is armed with this volume, which can be easily carried in an ordinary coat pocket, will be able to meet almost any difficulty that may present itself in matters of procedure. To judges, who, however much they may be bound to appear to have every point at their finger-ends, would themselves be the first to acknowledge that memory is sometimes at fault on most fundamental points of practice, this easy means of reference is sure to prove valuable. And although the work relates only to indictable offences, inferior magistrates and justices of the peace will often find aid from it in those points of procedure which occur in the preliminary stages of criminal investigation. An admirable table of contents, and a clear and well-adjusted index, make complete a book which, though unambitious, is for that very reason more likely to be often referred to than many others, in which the grains are so often hid in pecks of chaff. The book may be heartily recommended to all who may require to study English procedure. The Scotch student will find no simpler means of comparing our markedly different system with that which obtains in England. And there is no ground for thinking that the comparison will bring about an unfavourable result for Scots criminal law.

The Month.

THE following important and interesting Report has been presented to the Faculty of Advocates, by a Committee appointed to consider the Representative Peers (Scotland) Election Procedure Bill, 1882:—

I. Two Bills upon this subject were presented to the House of Lords in the present session of Parliament—one by the Earl of Galloway, who had introduced a Bill upon the same subject in a former session, and the other by the Lord Chancellor.

The Bill of the Earl of Galloway has not been read a second time; and the Bill of the Lord Chancellor having been read a second time, and referred to the Committee of the whole House, has now been reprinted as amended on Report, and is to be again considered in Committee on the 29th of May. Your Committee have therefore deemed it necessary only to report upon the Lord Chancellor's Bill as amended; but it is proper to mention that this Bill, as originally drawn, was in several of its clauses modelled upon the Bill introduced by the Earl of Galloway, and, as amended, contains some provisions based upon amendments by the Earls of Galloway and Kintore and the Marquis of Huntly, so that in its present form the Bill is to some extent the result of a combination of the two original Bills.

The proposed legislation on this subject was preceded by a Report of a Select Committee of the House of Lords, of which Lord Moncreiff was chairman, appointed to inquire into "the present state of the law as to Claims and Assumption of Titles of Peerage in the United Kingdom, and in Scotland and Ireland respectively, and the means of proving and establishing the same; and

as to the proceedings and claims to vote at elections of Representative Peers of Scotland and Ireland respectively; and whether it is desirable that the present state of law or practice as to any of the matters aforesaid should be amended; and also to inquire into the present procedure and practice of this House in its Committee of Privileges; and whether such procedure and practice can be amended so as to diminish the delay and expense incident to the determination of claims of peerage and claims to vote at elections of Representative Peers of Scotland and Ireland respectively."

The evidence taken by the Committee was almost entirely, and its Report is entirely, confined to those parts of the Remit which concern the procedure at the election of Scottish Representative Peers, and the procedure of the Committee of Privileges when claims to Scottish Peerages are referred to it by the Crown.

The evils complained of, and in part referred to in the remit to the Select Committee, were—

1. The absence in the existing procedure for the election of Scottish Representative Peers of any sufficient check against votes by pretenders to Peerages, and the practical inefficiency of the present system of protests.

2. The inconvenience, delay, and expense incident to the procedure of the Committee of Privileges in claims to Scottish Peerages, and the fact that doubts have been expressed whether its resolutions have been in all points in conformity with the law of Scotland.

The Lord Chancellor's Bill, as amended, does not directly deal with the constitution and procedure of the Committee of Privileges with reference to Peerage claims, and such claims may still be referred by the Crown to that Committee as at present.

But the resolution adopted by the House of Lords, on the motion of the Earl of Redesdale, that three of the Lords of Appeal shall sit upon the Committee of Privileges when it considers Peerage claims, is a partial recognition of the complaints as to its procedure being in some respects well-grounded. It remains, however, an anomaly that the chairman of the Committee, who may be, and at present is, a lay lord, should vote upon its resolutions as to peerage claims, which involve difficult questions of legal right, whereas, when the House sits in its judicial capacity, no lay lord has voted since the discussion on the Writ of Error in the case of the *Queen v. O'Connell*, in 1844, and the recent attempt of Lord Denman to assert this privilege has failed.

The proposals in the Bill have two main objects:—The formation of a roll of Scottish Peers for election purposes in order to remedy the inconveniences felt with regard to the procedure at elections of Representative Peers, and the introduction of a new procedure for correcting errors in the election roll by the Committee of Privileges, with the aid, if it thinks proper, of the Court of Session in Scotland; and your Committee will now explain its provisions.

It is necessary before doing so to mention that the roll at present called at elections is not a roll of Peers, but of Peerages. Certain Commissioners were appointed in the reign of James VI., who issued a decree, called the Decree of Ranking, in 1606, upon the basis of which a roll, commonly called the Union Roll, was founded, entitled "An authentic List of the Peerage of the North Part of Great Britain, called Scotland, as it stood the 1st day of May 1707 years." This, with certain alterations in consequence of attainders, the restoration of attainted titles, the resolutions of the House of Lords in favour of claimants to dormant peerages, the omission of titles upon which no vote had been given since 1800, under the Act of 1847 (10 and 11 Vict. cap. 52, sec. 1), and the addition of the titles of His Royal Highness the Prince of Wales as Prince and Steward of Scotland and Duke of Rothesay, is the roll now in use; and it regulates both the procedure at elections of Representative Peers and the precedence of all the Peers of Scotland.

The Bill provides that the Lord Clerk Register shall, before 1st January 1884, and annually thereafter, prepare a roll of the Peerages and Peers of Scotland in accordance with their existing precedence as such Union Roll now

stands after all alterations from time to time made thereon by lawful authority, to be entitled the Representative Peers of Scotland Election Roll, and to be in force for the succeeding year (sec. 1).

In the election roll there are to be set opposite the title of honour the Christian name and surname of each peer living at the date of its preparation, who in respect of such title has been elected and has sat as a Representative Peer, or has voted without protest at an election of Representative Peers since 1st January 1882, or whose right has been established by order or resolution of the House of Lords; but where two or more titles are held by the same person, it shall not be necessary to enter his name and surname more than once (sec. 2).

The roll is to be published annually by the Lord Clerk Register in the *London and Edinburgh Gazettes*, to be open to inspection in the Register House, and a certified copy is to be transmitted to the Clerk of Parliaments (sec. 3).

After the first copy has been so transmitted, it is to be the roll called at all elections; only Peers whose names are upon it, and any whose names have been added by order of the House of Lords between the date of its preparation and an election, shall be entitled to appear or vote at elections of Representative Peers; and no objection or protest either as to the right to vote, or as to precedence, shall be debated at the time of such elections (sec. 4).

Subject to the observations made in the second part of this Report, your Committee approve of these provisions, which are in substantial conformity with the recommendations of the Select Committee. They will introduce a simpler form of election roll and of procedure at elections, preventing the indecorous contests occasioned by the appearance of pretenders to peerages.

A proviso is, however, inserted in section 2: "Provided always, that notwithstanding anything herein contained, the House of Lords may at any time direct the name of any other person whose right to vote at elections of Representative Peers for Scotland may appear to the said House to be established to be added to the said roll;" the meaning of which is not, and in the opinion of your Committee requires to be made clear. The proviso can scarcely be intended to refer to provisions afterwards enacted in the Bill as to the correction of the roll, which would be superfluous; while, if it is meant, as is probable, to refer to the directions of the House of Lords in carrying out the resolutions of the Committee of Privileges when Scottish Peerage claims are referred to it by the Crown, this should be distinctly expressed. Any general power of the House of Lords to direct the alteration of such a roll by a mere vote of the House would, in the opinion of your Committee, be objectionable and contrary to constitutional principle.

By section 5 the procedure by heirs of deceased peers, in order to the insertion of their names on the election roll, is regulated. They are to present an application, accompanied by an extract decree of service and evidence proving their relationship, to the Lord Clerk Register, who is to transmit such application to the Clerk of Parliaments to be laid before the House of Lords, which is to refer it to the Lord Chancellor or Keeper of the Great Seal to report; and the House of Lords, if satisfied with his report, may direct the Lord Clerk Register to make the necessary insertion, and, if not satisfied, may refuse until the claim is established in the manner provided by section 7 of the Bill. Your Committee approve of proof of the character of heir to a peerage being by service, the ordinary and simple form of the law of Scotland in regard to heritable rights. But the transmission of such proof by—(1) The Lord Clerk Register, to (2) the Clerk of Parliaments, and (3) by the House of Lords, to (4) the Lord Chancellor, who is to report (5) to the House of Lords, which may (6) direct the Lord Clerk Register to insert the name, appears a roundabout mode of taking what, with some exceptions, will be an uncontested and incontestable step in general, indeed requiring no more than satisfactory proof that the applicant is the legitimate son and heir of his father. It appears to your Committee that it would be simpler and sufficient to provide that the Lord Clerk Register shall, after due advertisement of the application, if satisfied that the applicant possesses the character of heir entitling him to such title of honour,

insert his name in the election roll, and transmit a certificate of such insertion to the Clerk of Parliaments, or otherwise, if not satisfied, may refuse to make the insertion until his claim is established in the manner provided by the Bill, section 7. If this suggestion is adopted, the words "or of the Lord Clerk Register" should be added after the words "order of the House of Lords" in section 4.

By section 6 the Lord Clerk Register shall make such amendments in the Bill as may be directed by the House of Lords, pursuant to the provisions of this or any other Act.

Section 7 provides that any person who alleges that he is a Peer of Scotland, entitled to vote at elections, and that his name is not upon the roll, or is upon the roll not in the order of precedency to which he claims right, may petition Her Majesty for the establishment of the right claimed by him, and for the rectification of the roll by the insertion of his name thereon in its due and proper order of precedency. Such petition may be referred by the Crown to the House of Lords, who shall cause it to be inquired into by the Committee of Privileges; and the House may resolve, upon the report of the Committee, that the claim or complaint made in the petition has or has not been established, and if held to be established, may direct the Lord Clerk Register to rectify the roll; and the "determination of the House of Lords shall be final and conclusive in law." In so far as it is proposed by this section to confer upon the House of Lords a new jurisdiction to alter the precedency of Scottish Peers, your Committee do not approve of it. The Decree of Ranking of 1606 was, by its terms, challengeable only by action before the Court of Session. All alterations legally made on it before the Union were made by that Court, and the House of Lords has hitherto refused to adjudicate upon questions of precedency in Scottish titles of honour.

By a proviso of this section, "it shall be lawful for the Committee of Privileges, if they shall think fit, either before or in the course of making inquiry into any such petition, to refer the same, or any question of law or fact arising thereon, to the Court of Session, for their consideration and report." Power is given to the Court of Session to compel the attendance of witnesses and the production of documents, as in its ordinary jurisdiction; and the Court is to report the result of its consideration of the matter referred, together with any evidence taken by it. Apart from the objections to the new jurisdiction proposed to be created in precedency questions, and subject to the observations in the second part of this Report, your Committee approve of the provisions of this section, although they would prefer that the reference to the Court of Session should not be optional. It appears to them that, assuming advantage is taken of the power of reference to the Court of Session, these provisions are calculated to do much to remove the doubts which have been felt with regard to the resolutions of the Committee of Privileges. There should be a definition, however, of the Judges in the Court of Session who are to make such report; and your Committee suggest that the reference should be "to the First Division of the Inner House of the Court of Session, with power to such Division, in the event of difference of opinion, to consult the whole Judges of the said Court."

By section 8, the right of protest in the manner heretofore accustomed is reserved, and in the event of such protest by two or more Peers present and voting, the provisions of the Act of 1847 (10 and 11 Vict. c. 52, sec. 3) are to continue in force, by which the person against whose claim to vote it has been made may be required by the House of Lords to establish his claim, and failing his doing so, the title of such peerage is not to be called at any future election. The concluding section 9 gives the short title of the Act.

II. Your Committee have hitherto confined their attention to the proposals of the Bill. But the importance and interest of the subject shown by a protest signed by the Duke of Sutherland, the Marquises of Bute and Ailsa, the Earls of Crawford and Balcarres, Erroll, Mar, Morton, Eglinton, Moray, Perth and Melfort, Haddington, Galloway, Wemyss and March, Carnwath, Duudonald,

Kintore, and Stair, Viscounts Arbuthnot and Strathallan, and Lords Lovat, Blantyre, and Belhaven and Stenton, which states that, "Up to the Union in 1707, all matters regarding the rights of the Scottish Peerage were decided by the Court of Session, whose authority and jurisdiction remain still unimpaired, as laid down by the 19th article of the Union," and by the presentation to the House of Lords of a petition very largely signed by members of the learned professions in Scotland, and others, in favour of the jurisdiction of the Court of Session, with an appeal to the House of Lords, as preferable to the scheme of the Bill by which the Committee of Privileges is still to act, with powers of reference only to the Court of Session, have led your Committee to consider, What court or tribunal had jurisdiction in disputed questions as to Scottish titles of honour prior and subsequent to the Union. This has seemed to them the more necessary, as in a recent debate in the House of Lords some of the Peers stated their want of certain information on the subject. It appeared to your Committee that such information could be supplied only by a search for precedents, which they have made, and now report the result.

Prior to the institution of the Court of Session in 1532, there are few disputes relative to the right of peerage in Scotland, of which evidence is extant in the records or authentic history. The only cases they have discovered are the following:—

In 1213, shortly before the end of the reign of William the Lion, a contest between Maurice Senior and Maurice Junior as to the Earldom of Menteith was adjusted by a compromise in the *Curia Regis* at Edinburgh, embodied in a charter, to which Alexander, afterwards Alexander II., the Earls of Fife and Strathern, the Chancellor, and some of the principal Barons were witnesses.

In 1285 a dispute as to the same Earldom, pending since the death of Walter Comyn, Earl of Menteith, in 1257, which had been at one time attempted to be brought before a Papal Nuncio at York, an attempt successfully resisted by Alexander III. as contrary to the privileges of the king and kingdom of Scotland, was finally decided in a great Council (*Magnum Concilium*) at Scone, by Alexander III. and the Estates of the Kingdom, in favour of Walter Stewart (Balloch).

In the proceedings before Edward I. as to the succession to the Crown of Scotland, one of the pleadings for Balliol, in order to prove that Earldoms were not partible, adduces the case of the Earldom of Athole, decided in full Parliament (*en plein parlement*) in favour of Isabella, the elder daughter. The pleading is in a paper much decayed by age, but it is ascertained by other evidence that this Isabella was the elder daughter of Henry, Earl of Athole, and that, on the death of her son Patrick, Earl of Athole, in 1242, his aunt Fernelith, wife of David de Hastings, the younger sister, succeeded, so that the decision in full Parliament referred to must have been prior to 1242.

In 1438, by two retours of special service of 22nd April and 16th October 1438, before Sir Alexander Forbes, Sheriff of Aberdeen, and Inquests, Robert, Lord Erskine, was served heir in special to Isabella, Countess of Mar, in the two halves of the Earldom (*Comitatus*) of Mar.

In 1457 the latter of these retours was reduced by an inquest at Aberdeen, at the instance of the King, James II., during an eyre or circuit held by Lord Lindsay of the Byres, Justiciar of Scotland north of the Forth, on the ground that the former inquest had proceeded on error in law.

Your Committee have no concern with the controverted questions whether the verdicts of the original inquests in 1438, or of the inquest in 1457, were well founded on the merits. They refer to the proceedings merely for the purpose of showing before what tribunals questions as to titles of honour have in fact been raised. It has been suggested that the dispute related solely to the lands of the Earldom and not to the title of Earl; but your Committee have observed no instances prior to 1578 in which the right to the *Comitatus* or earldom did not imply the right to the title of Earl, and only five cases in which the title of *Comes* was separately mentioned in charters by which the *Comitatus* was also granted.

In 1488, an Act of Parliament by James IV., with the advice of the Estates, declares that Sir Henry Sinclair should be "callit Lord Sinclair in tyme to cum, with all dignities, eminencies, preveligiis, tenanda, tenandries belonging tharto, after the forme of the charters and evidentes maid tharupoun" (Act Parl. II. 213 a).

If it were safe, from so few instances, to deduce a general conclusion as to the jurisdiction in claims with reference to titles of honour prior to the institution of the Court of Session, that conclusion might be that the jurisdiction was originally exercised by the King and the *Pares Curie* in the *Curia Regis*, and after the *Curia Regis* had, as far as regards its deliberative and some of its judicial functions, passed into the form of Parliament, that it was exercised by the King and Parliament; although in particular cases, as in that of Mar above referred to, the right to the succession in titles of honour may have been decided by the same Courts and in the same form of service, by brief retoured to Chancery, or reduction of such service, as the right to the succession in estates of land.

Probably during this period such rights were more often determined in the field of battle or by forfeitures and new grants, the result of the fortune of war, than by legal procedure.

The Court of Session was instituted by James V. and Parliament in 1532, with jurisdiction in "all causes civil," and from that period to the Union the cases of disputes as to Titles of Honour or Rights of Peerage on record, or mentioned in authentic history, are more frequent.

On 14th April 1543, the Court of Session, by an interlocutory sentence, sustained the relevancy of the reasons of reduction contained in a summons at the instance of James, third Earl of Morton, against the Crown and Robert Douglas of Loch Leven, of a resignation *in favorem* of the Earldom (reserving his own liferent), which the pursuer had granted in favour of Douglas of Loch Leven on 17th October 1540, a Crown charter in favour of Loch Leven of the same date, and a resignation of his reversion which Douglas of Loch Leven had on 20th January 1540-41 granted to the late king.

That this process of reduction should be raised had been made a stipulation in the marriage contract of the youngest daughter of the pursuer with James Douglas of the Angus branch of the family, and afterwards the Regent Morton. On 22nd April 1543, the pursuer, James, Earl of Morton, granted a charter of the Earldom, of which he the same day got a Crown confirmation, in favour of his daughter and her husband James Douglas, with the same reservation of liferent; and on 24th April a final decree of reduction was pronounced by the Court of Session.

That this charter, as well as the reduced charter of 17th October 1540, which was conceived in similar terms, was understood to convey the dignity of Earl, is shown by the son-in-law, James Douglas, being immediately designed Master of Morton, the title of an heir-apparent, and becoming, after his father-in-law's death in 1553, Earl of Morton, a dignity to which neither in his own right nor that of his wife (who had elder married sisters) he could otherwise have had any claim.

In 1586, James Hamilton, Earl of Arran, and his curator raised an action of reduction in the Court of Session of two charters, ratified in Parliament, proceeding upon a resignation of that Earldom, which he had himself granted in 1581 in favour of James Stewart, younger son of Andrew, Lord Stewart of Ochiltree, and for decree of declarator restoring himself to the honours, on the ground that he was not of sound mind when the charter was granted. On 26th January 1586, the defender Stewart was ordered to produce the charter by 7th January following, with certification that if he did not, decree would be pronounced against him. The final decree has not been found, but that it was pronounced appears almost certain, as James Hamilton thereafter appears on record as Earl of Arran, and the defender as Captain James Stewart.

In 1588-89 the Court of Session pronounced decree of absolvitor in favour of William Douglas of Glenbervie, heir-male of the Earl of Angus, in an action

of reduction of charters settling the Earldom on heirs-male, which had been granted in 1547, and a charter of confirmation by Queen Mary in 1564, ratified in Parliament in 1567. This action was raised by James VI., claiming the Earldom as heir-female, in right of his grandmother Margaret, Countess of Lennox. Throughout the proceedings the defender is styled William Douglas of Glenbervie, but after the decree had established his right he is styled William, now Earl of Angus.

In 1592 an Act of Privy Council declared, with reference to a dispute as to the title of Earl of Morton between Lord Maxwell and William Douglas of Loch Leven, "Be it always understood that thir presents sall naways hinder nor prejug the forsaidis personis of ony action quhilk thay have or may have twiching the decisions of ather of their richts and titlis pretendit be thame to the said erledome, befor the jugeis competent thairto, as accordis of law."

In 1613, the Privy Council, when applied to by James VI. to prevent the assumption of the title of the Earl of Eglinton by Sir Alexander Seton, declined to interfere, and stated, with reference to the infestment of tailzie and retour upon which Seton claimed the title, "Quhilk infestment and retour being at lenthe seene considderit and examined be us, it was fundin be the hail voiceis of the table that the disputationis quhilkis wald aryse thairupon could not be proper or competent to be handlit in this judgment (i.e. judicatory), but behoofit to abyde be the course of law, in the ordinar judgment of the Sessionn."

In a decree, dated 1st July 1626, in a reduction before the Court of Session at the instance of John, Earl of Mar, against Lord Elphinstone, that Court reduced the service, called the Service Negative, obtained in 1457 by James II., as formerly mentioned, before an inquest at Aberdeen, annulling the retour of Robert, Lord Erskine, as heir of Isabella, Countess of Mar.

In 1631, Charles I., in a letter to the Privy Council, directing it to prohibit Sir William Ker of Blackhope from assuming the title of Earl of Lothian, did so with the reservation that "he might seek relieff by the laws of that our kingdom, and shall have such just hearing as we do willingly grant to all our subjecta." By this expression your Committee understand the Court of Session is referred to, which was a Court open to all the king's subjects in Scotland, whether commoners or peers.

In 1633 the same king wrote a letter to the Court of Session with reference to a dispute to the title of Earl of Home, that seeing, "with their approbation that brevis are raised to serve James Home air-maill to the late Earl of Home, all due evidence be sought after concerning his honours and estate, and that in all actions that shall come before you, touching that succession in future, justice, without delay or respect of persons, be equallie administrat."

In 1633 the Court of Session reduced, in an action at the instance of Charles I., two retours of the service of William Graham, Earl of Menteith, as heir of David, Earl of Strathern, and two charters granted by the king following on these retours, and also a patent of honour of the Earldom and dignity of Strathern in favour of William Graham, on the ground that it had been granted upon wrong information.

In the same year, 1633, an action of reduction was tried in the Court of Session of a disposition, containing a procuratory of resignation by Laurence, Lord Oliphant, of all his lands, together with the title of the lordship of Oliphant, to Patrick Oliphant and his heirs-male. The pursuer was husband of the only child and daughter of Laurence, Lord Oliphant, and the Court found that the title was one which would have passed to heirs-female, but that the pursuer could not claim it in right of his wife, as her father's deed was effectual to denude him and persons claiming through him of the title, although ineffectual to transfer it to a third party. This decision is here cited only to show that the jurisdiction of the Court of Session was exercised, and the report states the Lord Advocate appeared for the King, who was present when it was decided.

In 1671 the Court of Session reduced a disposition of the whole estate and

dignity or title of Lord Coupar, by James, Lord Coupar, in favour of his wife and her heirs, upon the ground that it was executed on deathbed. This action was raised by Lord Balmerino, in the name of his creditors, to avoid the necessity of serving heir to Lord Coupar before it was decided, so that it may be a question whether the decree affected the title as well as the estate, although it is certain that the disposition reduced purported to convey the title as well as the estate, and that the title was recognised as joined with that of Balmerino.

In 1681, Charles II., upon the advice of the Privy Council, having formerly prohibited George Sinclair of Keiss from assuming the title of Earl of Caithness, in consequence of the legal right to it supposed to be in John Campbell of Glenorchy, removed the prohibition by a letter to the Privy Council of 22nd July 1681, which states: "And that you (i.e. the Privy Council), considering that wee by our letter, dated 17th January 1676-77, did order a proclamation to be issued discharging the s^d George Sinclair to assume the title of Erle of Caithness, or any of our subjects to give him that title until our future pleasure should be known in this affair: Whereupon, after your opinion unto us that the said stop might be taken off to the end that both parties may be left to pursue their several rights before the Judge Ordinary, as use is in such cases, we have now thought fit (upon full consideration of both their pretensions, and in concurrence with your said opinion) hereby to authorize and require you to remove the stop which was formerly laid by us upon the said George Sinclair from assuming the said title of Erle of Caithness, and do suffer as well him as the said John, Erle of Caithness, to pursue their several rights before the Judge Ordinary, according to the custom in such cases provided."

In 1682, a claim having been made by Lord Lindores to the Earldom of Rothes before the Privy Council, the Countess of Rothes objected that such claim was only competent before the Judge Ordinary, and the Privy Council accordingly remitted "the matter in debate to the Lords of Session, to be discussed by them as accords of law;" a case which shows that at this date the Court of Session was deemed the Judge Ordinary in Peerage claims.

In 1685, David Lindsay of Edzell raised a reduction before Parliament of a charter of resignation of the title of Earl of Crawford.

No reference to these proceedings is extant in the records of Parliament, but the warrant and charge to summon the defender and the defender's information have been found in the Crawford charter chest, and are printed by Mr. Riddell (*Peerage Law*, ii. p. 967 et seq.). With reference to this case Sir John Nisbet of Dirleton, Lord Advocate of Charles II., stated his opinion that the jurisdiction of Parliament would not be sustained if "it were represented that by divers ancient laws, and for great reasons it was provided that all complaints in *civilibus* should be first pursued before the Judge Ordinary." Sir James Stewart, Lord Advocate of Queen Anne, concurs in this opinion, and adds as a reason, "for our Parliaments were at least far better constituted for settling general laws than for discussing the private rights of parties," and in accordance with these opinions the action appears to have dropped. In 1702, by a decree in absence of the defender, Simon Fraser of Beaufort, the heir-male, the Court of Session adjudged and decerned that the honours and dignity of Lovat were in the person of Amelia, Baroness Lovat, as heir of line, and eldest daughter of Hugh, Lord Lovat, deceased.

In 1706, Lady Mary Bruce and her husband protested in Parliament against the admission of Sir Alexander Bruce of Broomhall as heir-male under the title of Earl of Kincardine, and while it was carried to admit, this was done: "Reserving to Lady Mary Bruce, and her husband for his interest, their right and declarator before the Lords of Session."

From the precedents and authorities cited, which are all bearing on the subject, your Committee have found, they conclude, that from shortly after the institution of the Court of Session down to the year preceding the Union, the jurisdiction of the Court of Session as the ordinary Court in disputed claims to titles of honour was exercised, and was acknowledged by the Crown, by

Parliament, by the Privy Council, and by lawyers specially charged with the maintenance of the rights of the Crown.

Your Committee in the course of their search have found no instance of such jurisdiction having been exercised by any other Court or person, unless when the right of succession was disputed in the Court of the Sheriff for service of heirs, whose decisions were subject to review by the Court of Session.

In particular, they have found no instance of Parliament having exercised this jurisdiction after the institution of the Court of Session.

In all the cases in which the jurisdiction was exercised by the Court of Session, the parties proceeded by action in ordinary course, and not under a reference from the Crown, as was the case in England; in which country the procedure was by petition to the Crown, usually referred to certain Courts, Commissioners, or Judges, and latterly to the House of Lords, for their opinion.

By the Articles of Union it is provided that: "The Court of Session or College of Justice do, after the Union, and notwithstanding thereof, remain in all time coming within Scotland as it is now constituted by the laws of that kingdom, and with the same authority and privileges as before the Union, subject nevertheless to such regulations for the better administration of justice as shall be made by the Parliament of Great Britain."—(Article xix.)

By another Article it is provided that "All Peers of Scotland, and their successors to the honours and dignities, shall, from and after the Union, be Peers of Great Britain . . . and shall be tried as Peers of Great Britain, and shall enjoy all privileges of Peers, as fully as the Peers of England do now, or as they or any other Peers of Great Britain may hereafter enjoy the same, except the right and privilege of sitting in the House of Lords, and the privileges depending thereon, and particularly the right of sitting upon the trials of Peers."—(Article xxiii.)

A suggestion has been made that one of the privileges of the Peers of England, and therefore, under this Article, of the Peers of Scotland, is to have the question whether they are or are not entitled to rights of peerage determined by the House of Lords.

Your Committee are unable to adopt this suggestion, for they do not find it stated by any writer of authority in Constitutional or Peerage Law that such a privilege belongs to the Peers of England, or persons claiming to be Peers of England; but, on the contrary, they find it stated by Mr. Cruise, the standard authority on the Peerage Law of England, that "The Crown appears to have exercised from the earliest times the supreme jurisdiction in all cases respecting the right to those dignities which were not annexed to the possessions of particular castles, houses, lordships, or manors. For the mode of proceeding seems always to have been by petition to the King; and the Court to which the Crown usually referred such claims was that of the High Constable and Earl Marshall, whose cases were determined by the rules and customs of chivalry" (Cruise on *Dignities*, 2nd edition, chap. vi. sec. 1). The practice at present is for the Crown to refer such petitions to the Attorney-General, and for the Attorney-General, where he has any doubts, to "recommend that the claim be referred by His Majesty to the House of Peers;" but it is also stated by Mr. Cruise, that "this reference to the House of Peers is discretionary in the Crown, for it might resume the former practice of referring claims of Peerage to the Court of the Earl Marshall, or may act on the report of the Attorney-General, and grant the claimant a writ of summons without any reference; or refuse to make any reference, as was done in the case of the Earldom of Banbury in 1727 by the advice of Sir Philip Yorke, afterwards Lord Hardwicke" (sec. 25), and that "without a reference by the Crown, the House of Lords has no right to entertain a claim to a dignity" (sec. 26). The origin of the English practice to refer such claims to the House of Lords appears to have been the course taken by Charles I. with reference to the petitions in 1625 by Lord Willoughby D'Eresby and Robert Vere to the Earldom of Oxford and office of Great Chamberlain, which is thus stated in a letter signed by that King: "Seeing these petitions concern so great an

honour and office of inheritance, and that it falls out so opportunely during the sitting of our high Court of Parliament, we think it fit to take the advice of our Lords and Peers of the higher Court of Parliament, who have the judges with them for their assistance in any point of law which may arise; therefore, our pleasure is that their Lordships call the competitors before them, and examine their titles, and certify us what they find, and their opinions thereof, whereupon we shall do that to either which shall be just."

From all which, it appears that the Peers of England have no such privilege to try questions relating to claims of Peerage, and that claimants to English Peerages have not any privilege to have their claims tried by the House of Peers.

It also occurs to your Committee that the privileges conferred by the thirty-third Article of the Union are conferred upon Peers of Scotland, and not upon persons claiming to be, but who may not be, Peers.

Your Committee have deemed it right to continue their examination as to the practice in such cases after the Union; but as this period is comparatively recent and the facts well known, it may be very shortly stated. Soon after the Union the practice commenced of persons claiming to be Peers of Scotland, whose titles were disputed, proceeding by petition to the Crown as in England, and of the Crown referring such petitions to the House of Lords of Great Britain.

In 1711, the House of Lords, without a reference from the Crown, ordered that the claim of James, Duke of Ormonde, to the title of Lord Dingwall "be, and it is hereby referred to the Lords' Committee of Privileges, to consider thereof, and report their opinion thereon to the House;" and in 1714, the House, on the report of the Committee of Privileges, were "of opinion that the Lord Dingwall should be inserted in the roll of the nobility in Scotland immediately before the Lord Cranstoun," approved of the report, and the entry was accordingly made. The procedure of the House of Lords in this case without reference from the Crown is acknowledged to have been illegal, and has never since been followed.

In 1723, James, Lord Somerville, presented a petition to the King claiming that title, which was referred to the House of Lords by the Crown, and by that House to the Committee of Privileges, which reported in favour of the claim, and the House agreed to the report and sanctioned the claim. Since this date, with two exceptions to be immediately noted, the practice as to claims has been uniformly in this manner, and 46 cases in all have been so reported on between 1723, when the Somerville case was reported on, and 1881, when the Dysart case was reported on.

The two exceptions referred to were:—

In 1729, Simon Fraser of Beaufort, as heir-male, raised a reduction of the decree pronounced in his absence by the Court of Session in favour of the heir-female to the Barony of Lovat; and upon 3d July 1730 the Court of Session decided in his favour, and he became Lord Lovat. He was, after the 1745, impeached before the House of Lords. In the message by the House of Commons to the House of Lords relative to the impeachment, he is designed "a Peer of the realm, Simon, Lord Lovat;" and in pronouncing sentence, Lord Hardwicke, as Lord High Steward, stated "after a long and impartial trial, upon the clearest and most convincing evidence, against which you offered no defence by witnesses, your peers have unanimously found you guilty." Lord Lovat's title to the Peerage, thus solemnly recognised, depended upon the decree of the Court of Session.

In 1733, James Macgill of Rankeillour raised an action of declarator of his title to the honour of Viscount Oxenford before the Court of Session, which was defended by Robert Maitland Macgill of Cranstoun, but the proceedings in the action were not pursued to a decision, and in 1735 James Macgill presented a petition, claiming the title, to the King, which was referred to the House of Lords; and on a report of the Committee of Privileges, it was agreed that the petitioner had not established his claim.

Since the action by James Macgill in 1733, no claim to a right of Peerage has been brought before the Court of Session for decision.

There remains to be noticed the practice as to disputes with reference to precedency, to which great importance has from the earliest times been attached by the Peers of Scotland, but the facts as to this are not open to controversy, and may be briefly summarized as follows:—

Such disputes frequently arose in the solemn riding or procession of the members of Parliament to the places in which it assembled, and were occasionally the subjects of protests in Parliament after it assembled. With a view of preventing such disputes, various Commissions were issued by James VI. and Parliament to fix the order of precedency. The first was in 1587, to certain Peers and others, with a quorum of four, the Earl Marischal being always one, along with the Lyon King and such heralds as they chose to call. This Commission was renewed in 1592 and in 1597. A new Commission was issued in 1600 to the Lords of the Privy Council, and finally, in 1606 a Commission to certain Peers, Lords of Session, the Lyon King, and the Lord Clerk Register, by which the decree known as the Decreet of Ranking was issued on 5th March 1606.

The Commission itself has not been preserved, but its terms are recited in the preamble of the Decreet of Ranking, and declared that the ranking given was to stand “ay and until ane decreet before the ordinair judge be recovered and obtained in the contrair;” in conformity with which the Decreet of Ranking concludes: “But (i.e. without) prejudice always to such person or persons as shall find themselves or their interests prejudged be the present ranking, to have recourse to the ordinair remeid of law be reduction before the Lords of Council and Session of the present decreet, for recovery of their own due place and rank be production of mair ancient and authentick rights nor has been used in the contrair of this process.”

The order adopted in the Decreet of Ranking has been impugned by some persons upon the ground that it is not in all cases conform to what is now, and probably was then known, as the dates of creation; and defended by others, in respect that the deviations from the dates of creation can be all explained either by the possession of certain high offices, entitling their holders to a preference, or the neglect to produce evidence before the Commissioners, showing the dates of creation. Your Committee are not concerned with this question, but only with the facts—(1) that this decreet has been recognised as the basis of the order of precedency, prior to the Union, amongst the Peers of Scotland, except in so far as reduced by action in the Court of Session, and as such was adopted in the roll called the Union Roll, and followed since; and (2) that in certain instances prior to the Union, it has been reduced by the Court of Session in virtue of the reservation contained in it.

Thus, in 1610, the Court of Session reduced the decreet, in so far as it gives the Earl of Eglinton precedence over the Earl of Glencairn, a decision which was repeated in 1648.

In 1628 it reduced the Decreet of Ranking in so far as it gave the titles of Eglinton, Morton, Cassillis, and Glencairn precedence over the title of the Earl of Buchan.

In 1661 it entertained a reduction and declarator by the Earl of Sutherland against the Earl of Errol relative to his precedency, but no final decree on this case was pronounced.

In 1706 it sustained the Decreet of Ranking in so far as it gave the title of Crawford precedence over that of Sutherland, but by a decree which was not final. The jurisdiction of the Court of Session in questions as to the precedency of Peers, was, your Committee find, recognised by Parliament in the following amongst other cases:—

In 1640, in the case of the Earl of Glencairn.

In 1646, in the case of Lord Spynie.

In 1661, in the case of Lord Sinclair and Lord Mordington, and in the case of the Earl of Caithness and the Earl of Buchan.

In 1689, in the case of the Earl of Tweeddale and the Earl of Selkirk.

In 1693, in the claim of the Earl of Sutherland to rank before other Earls.

The jurisdiction of the Court was also recognised by Charles II. in a letter to the Lords of Session, dated 14th July 1679, inserted in the Books of Sederunt of that Court, relative to the disputed precedence between the Earl of Roxburgh and the Earl of Lothian, which states: "Wee do not doubt but that when any question shall come before you concerning that place and precedence, either as to the right or possession, you will judge it according to law, and will not consider our interest in it further than that wee, being the undoubted fountain of honour, it is our royall concern and desire that the streams of nobility and honour which are devised by patents and grants from us and our royall predecessors, be so ordered as there may be no inverting of the law, nor inroaching of one upon another; and that by your justice and decision the precedence may be adjudged to him who by law has right, and ought to have it."

The ordinary mode of procedure before the Court of Session did not, however, put a stop to the practice of protests for precedence in Parliament itself, for as many as 170 instances of such protests, without counting counter-protests, are entered in the records of Parliament between 1617 and the Union. In one case your Committee find the question of precedence was debated in 1685 before the Lords of the Articles, by whom, of consent of parties, it was remitted to and decided by the King (the Earl of Roxburgh and the Earl of Lothian); and in one other case a question of precedence was decided by Parliament in 1661, upon a report from the Lords of the Articles. Both of these cases related to Peerages created since the date of the Decreet of Ranking.

Shortly after the Union a report of the Committee of the whole House of Lords, agreed to on 12th February 1708, stated: "That whereas there are several protests entered on the records of Parliament of that part of Great Britain called Scotland in relation to the precedence of Peers, the said protests are and shall be of the same force as if they had been entered in the roll of Peers or in the journal of the House of Lords."

This report was probably the reason of the protests for precedence continuing to be made when the roll is called at the election of Representative Peers down to the present time, and such protests are supposed by some lawyers to be necessary to prevent the negative prescription of the Act 1617, c. 12, being a bar to the reduction of the Decreet of Ranking, a point on which your Committee express no opinion.

Neither do they think it within their province to express an opinion whether an action of reduction of the Decreet of Ranking would now be competent before the Court of Session, as the question may be raised for decision before that Court. They have only further to state that in one instance proceedings have been taken since the Union with that view, by the wakening in 1746 of the process between the Earls of Sutherland and Crawford before referred to. That process was not thereafter prosecuted to a decision; but the House of Lords, in the claim to the Peerage of Sutherland in 1769, in so far recognised the competency of these proceedings that they directed intimation to the Earl of Crawford, and the Earl of Errol, who had also been a party to the precedence case in the Court of Session, and these Earls, who would otherwise have had no title to appear, were heard for their interest.

Your Committee have found no case in which the order of precedence in the Decreet of Ranking and the Union Roll has been altered by the House of Lords, and it is understood that the petition by the Duke of Sutherland in 1847 to the House of Lords praying for a higher precedence as Earl of Sutherland than the title possesses on the Union Roll, was held by the Committee of Privileges to be incompetent, as beyond the jurisdiction of the House of Lords. In a debate in the House of Lords on 9th July 1877, upon a resolution which proposed to alter the precedence given on the Union Roll and Decreet of Ranking, and was withdrawn by its mover the Duke of Buccleuch, Lord Selborne stated his

opinion, with which your Committee concur, that nothing would in his judgment "be more unsafe for your Lordships than to take upon yourselves the office of rectifying any errors, if errors there be, in the ranking of those Peers." Your Committee have therefore, in the first part of their Report, offered their opinion that the right to make such an alteration should not be conferred, directly or indirectly, upon the House of Lords by the Bill under consideration, for it does not appear to them desirable that that House should now be given by statute for the first time an original jurisdiction in matters involving difficult investigations into the law and records of Scotland.

Your Committee deem it beyond their province to express an opinion upon the question, which may be raised for decision by the Courts of law, whether the jurisdiction which the precedents show the Court of Session had before the Union in determining claims to Scottish Peerages still continues, or has been lost by desuetude, and the contrary usage of claimants since shortly after the Union, except in the cases of Lovat and Oxenford, proceeding according to the custom of England by petition to the Crown, and by the Crown referring such petitions to the House of Lords.

But it appears to them to be within their province, in reporting upon the present Bill, to express an opinion that the exercise of such a jurisdiction by the Court of Session, subject to appeal to the House of Lords, would more effectually remedy the evils complained of than the procedure proposed by the Bill.

It would bring to the discussion and decision, in the first instance, of such cases, the knowledge of lawyers and judges versant in the law, history, and records of Scotland.

It would prepare both the facts and the law for the decision of the House of Lords as an appellate tribunal, a function for which it is better suited than the Committee of Privileges is suited to consider in the first instance cases depending upon Scottish law.

It would obviate the dissatisfaction which has been felt by such cases being determined solely by, or by a majority of, English lawyers, and possibly by the vote of a lay Peer as chairman of the Committee of Privileges.

It would probably prevent some of the delays in the decision of such cases; which have been in part caused by the frequent adjournments of the Committee of Privileges, for the convenience of parties or members of the Committee, and which would not be allowed by a judicial tribunal.

It would probably lessen the great cost of the procedure before the Committee of Privileges; for although the hearing before two tribunals instead of one would somewhat add to such cost, this would be more than counterbalanced by the saving of expense in taking the evidence in Scotland, where almost all the witnesses and documents are to be found, and by the avoidance of the frequent prorogations and rehearings of the present procedure.

While your Committee think that the Bill, as at present drawn, with the amendments suggested, will be a considerable improvement upon the existing procedure, they would prefer a measure which would declare or restore the jurisdiction exercised by the Court of Session before the Union, and at least in one case since the Union, subject to appeal to the House of Lords, in the same manner as other civil causes have been since the Union.

Great Meeting of the English Bar.—On Saturday last the Bar assembled in its hundreds (if we may judge from the influx into the Inner Temple Hall). "Authorized" reporters were not allowed to attend the proceedings, and if what has been furnished to us savours of the imaginative rather than the actual, we must decline responsibility.

We understand that Her Majesty's Attorney-General was in the

chair; and that he was supported by the Solicitor-General and all the leading members of both the Chancery and Common Law Bars.

The Chairman on rising was received with great applause. He said he knew nothing about the precise objects of the meeting.

A junior against the wainscot said everybody knew what the objects were, and he rose to a point of order. He had been fifty-five years at the Bar, and had held very few briefs—why he had not got more he had never been able to understand. Now there were men whom he saw at the top table who notoriously took more briefs than they could possibly attend to, who pocketed the fees, and did no work. This was taking fame, fortune, and respectability from other men who were just as good as they were, but yet who for some inscrutable reason rarely got any work, and if they did, never got paid for it. The questions for this meeting were not what the rules were to be to regulate practice in the Profession—the question was, How could those who had no practice get practice? Then would come the time to discuss how that practice was to be carried on. At present he, speaking personally and feelingly, realized two facts—that he had few briefs and fewer fees. Was there no remedy for this? (Hear, hear.) Where were the Benchers? What was the Attorney-General doing? (Cheers.) Was the junior Bar to die of inanition and blighted hopes, whilst a few leaders and a handful of stuffs gorged themselves with unearned increment?

A stuff-gownsmen standing on a distant table seconded the point of order, and wished further to know whether one of the objects of the meeting would be to abolish the office of Common Serjeant of the City of London. That functionary had ventured to suggest that a passage in a standard work on the practice of the Mayor's Court was inaccurate, and when reproved had written a letter to the press in very questionable taste. Was this to be tolerated by an independent profession? Could a standard work by a competent member of the Bar be lightly assailed by an irresponsible officer of an effete corporation, without exciting the wrath of and bringing down reprobation from an offended profession?

The entire Mayor's Court Bar gave vent to loud groans.

The Attorney-General.—Order!

Another junior.—Order is unknown in that tribunal. Call on the next case.

A voice in the gallery asked whether it was an object of the meeting to suggest measures for checking the ardour of fathers, mothers, brothers, sisters, wives, cousins, and clerks of barristers, in their exertions to get business for particular individuals. He was not sure that he ought not to have brought judges within the category of persons upon whom the drag should be put. He was himself perfectly innocent in such matters, but he was given to understand that much business of some importance to

clients was, by all sorts of irregular practices, the blandishments of pretty women and the frowns of imposing men, diverting into most undeserving and incompetent channels. (Oh!) He wished to explain that he had no intention of being personal.

[Calls for Lord Randolph Churchill.]

Another junior wished to inquire (before proceeding to the agenda paper) whether the committee to be appointed would have power to propose and carry the abolition of the Benchers. (Loud applause.) He understood there were many judges amongst the Benchers, and that they and their brethren (especially exhausted volcanoes in the shape of silks without business) lunched and dined sumptuously during the year at the expense of students and barristers who never dined or lunched in the Inn at all unless from necessity. What else the Benchers did he didn't know. Did anybody know, and if so (to adopt the modern form of interrogatories), who, and, if not, why not?

A gentleman who said he was called in 1775 rose to order. He had been a Benchers for over seventy years. During all that time it had never been suggested by anybody that a duty of any kind attached to the dignified and honourable position which he filled. He was educated at a time when technicality flourished, and when Westminster Hall slumbered year by year without exciting the observation of a Brummagem Parliament or a Radical Press, and when no Firth came forth to trouble the souls of gentlemanly corporations with long purses and no duties. All this seemed to be changed. Why should it be? Why should not they enjoy themselves? How could the Benchers possibly be interested in the fate of the Bar? What did it matter to them whether pleadings were abolished? There was a passage in Tacitus, which he had forgotten, referred to by Sterne in his *Sentimental Journey*, where a jackass—

Mr. Grigsby rose to order, and proposed that it should be a direction to the committee to intimate to the Benchers that their time had come. (Uproarious cheering.)

Mr. Giggleswit said a more important matter than any which had been mentioned was the question of fees. (Cheers.) Had any man in that hall ever been paid any fees? (No.) He thought not—he had not. Three years ago he defended an old woman at the Eatanswill sessions for cruelty to a cat. His fee was three and one—three and one! an unusual fee for sessions, and which from its magnitude caused much jealousy among the other twenty-nine members of the Bar who attended those sessions, the old woman being the only prisoner. That fee had never been paid from that day to this. (Shame!) Was there no remedy? That old woman had suffered the imprisonment which all his efforts (instigated and excited by the prospect of immediately realizing three and one) failed to avert; the cat was probably dead, but where was the

attorney—where the three and one? Was that *injuria sine damno*—or damn—(Order, order!)

The Solicitor-General begged to remind the Bar that nothing approaching swearing could be allowed. Affirmation was admissible, subject to penalties, but until hon. gentlemen had consulted the Lord Chief Justice, and thoroughly mastered the modern relation of free-thought to politics and law, the Bar would do wisely to limit themselves to the simplest and most unobjectionable modes of expression.

Sir Hardinge Giffard said, the conversation having taken this turn, he should like to know what the Bar thought about the recent Bradlaugh litigation, what was the action of maintenance, who was a common informer, what was blasphemy? Why were Foote and Ramsay in prison? What was the difference between North and Coleridge? Which was right and which wasn't? Who was certain about anything? Was the law ever in such a confounded condition? (Loud cries of "Order.")

The Chairman said he thought that questions of this difficult nature should be postponed to a subsequent occasion, when Mr. Warton promised to be present. (Loud cheers, and cries of a "block" in the Courts!)

At this point silence was restored by the rising of a most respected Liberal member of Parliament, who had grown grey and impecunious in keeping his seat and waiting for a judgeship. He humbly desired to inquire by virtue of what precedent or rule or custom Attorney-Generals' devils were promoted to the bench over the heads of everybody. He had spent £10,000, and wasted the best years of his life—days of toil and nights of unrest—in vainly aspiring to that blessed goal, only to see it attained to by stuffs who had been devils. He begged to propose that a petition should be presented to the Queen calling attention to this flagrant injustice to men in his position, who, although they might know very little law, were in this respect no worse than the common run of puisne judges. (Oh! Oh! withdraw!)

The Chairman thought the time had now arrived when they should proceed to the resolutions. He called upon

Mr. Touchwood, Q.C., who rose with great agility and with an entire absence of diffidence. Might he say one thing as an introduction? He was completely happy. He desired nothing. He was young, prosperous, popular, and could caricature the most dignified judge on the bench. He wanted nothing, cared for nobody, and was perfectly confident that he was just where he ought to be. He failed to see that any barrister could desire anything, or want to be protected against anybody. He begged to move the previous question. (Loud cries of "Turn him out.")

The newly-elected "Devil" thoroughly agreed with Touchwood, Q.C. All his fees were paid by the Treasury. The Bar was exciting itself without the slightest occasion.

Mr. Dolor called this frivolous. Might he say that a much more important question was, how many interrogatories were admissible in an undefended action of ejectment? He considered eighty-five reasonable, but they had all been disallowed.

At this point Mr. Hereford, Q.C., arrived from the Rule Committee, which he stated had adjourned over the Long Vacation. The Committee, he was glad to say, had reached rule 451, which provided for the abolition of all chief clerks and masters. The Public Prosecutor, having satisfactorily disposed of Boyns and Taylor at the expense of Mr. George Lewis, and having nothing more on his hands, had invented a machine which would grind out orders for time and particulars, prepare issues of fact for trial, decide on the relevancy and prolixity of interrogatories and inspection of documents, and tax costs at a speed and in a manner which would render appeals unnecessary, and dispense altogether with Divisional Courts. (Derisive laughter.)

The Chairman must again remind the meeting that they had not yet ascertained the object for which they were met together. (Cheers.) In the absence of any resolution, he must put the previous question. Those in favour of it say Aye, those against, No.

The Ayes had it, whereupon Touchwood, Q.C., was caught up in the arms of the Benchers of the Inner Temple, and translated to a chamber whose mysteries and luxuries are hidden from the vulgar gaze.

At the same moment Mr. Grossmith appeared in his chancellor's robes, and declared the meeting dissolved.—*Law Times*.

On Sheriffs.—It is very satisfactory that the Lord Advocate has had the courage to appoint as Sheriff of Ayrshire a gentleman holding the position of a Sheriff-Substitute. Time was, and that but a few years since, when official red-tapeism would not have sanctioned such a step. But common sense has prevailed, and has recognised that a lawyer who has had judicial experience is in general more likely to make a good Sheriff-Principal than one who has had none. No more suitable appointments were ever made than the successive promotions of the late Mr. Glassford Bell and Mr. Gillespie Dickson as Sheriff-Principal of Lanarkshire. In France the Judges are not selected from amongst practising advocates, as with us, but from a special class educated for the judiciary. Something of the same kind exists in the case of the magistracy in India, where the Civil servants are regularly trained for the administrative and judicial functions they are to perform. There is nothing of this in England. A barrister becomes a Judge of the Supreme Court *per saltum*. But the value of judicial training is so far acknowledged, that as a rule the members of the Courts of Appeal are selected from amongst those who have shown conspicuous ability as puisne Judges. So, too, in Scotland the Inner House, the Court of Appeal, is recruited from the Outer House of

the Court of Session, although in this instance the Judges are advanced according to seniority, and not to merit. For a number of years it has been growingly felt that our mode of making Judges is far from satisfactory, and stands much in need of reform. Our institutions will not permit of a radical change, at least at present; but much improvement may be effected, even under existing arrangements. It is a mere toss up whether or not a clever counsel will make a good Judge. Many of our ablest and most successful advocates have been undoubted failures on the bench, while not a few of our best Judges had little or no practice at the bar, and it is only by favour or accident that such men ever reach the Bench at all.

As things stand, the Bar will probably continue to provide the bulk of the Judges in the Supreme Court; but unprejudiced opinion in England has discovered that it is not the only source of supply, and that a quota might be drawn from the ranks of the County Court Judges, who correspond to our Sheriffs-Substitute. This was suggested by Lord Bramwell a few years ago, and a Committee of the Incorporated Law Society of the United Kingdom appointed to inquire into the practice and procedure of the County Courts has just reported that "great care should be exercised in the appointment of County Court Judges, and the recommendation of Lord Justice Bramwell to the Committee of the House of Commons on County Court jurisdiction, that a selection should be made from the roll of County Court Judges for promotion to the Supreme Court, should be adopted." What is suitable in England is even more so in Scotland, and we trust that the Home Secretary and the Lord Advocate will keep this recommendation before them. A Sheriff-Substitute in Scotland has much ampler jurisdiction than the English County Court Judge, and a large number of the cases coming before him are precisely the same in character and importance as those laid before the Supreme Court; but still a Sheriff-Substitute, no matter how eminent his judicial ability, is practically excluded from the Bench of the Court of Session. This arises from no legal disqualification, and is justified by no reason save the traditions of officialism. The gentleman who has just been made Sheriff of Ayrshire is now eligible, according to the red-tape standard, as a Senator of the College of Justice, and it is not unreasonable to suppose that he has accepted the smaller remuneration attaching to his new position in the hope of advancement in this direction at some future date. But why should such an absurd routine exist? Why should a Sheriff-Substitute in Edinburgh, Glasgow, or Aberdeen, whose salary, experience, and real official standing and importance are greater than those of most Sheriffs - Principal, be required to qualify himself for promotion by seeking in the first place what is really an inferior, though nominally a higher, office? Again, the difficulty of supplying the Bench of the Supreme Court

from the small, and to a large extent inexperienced, Bar of Edinburgh has repeatedly been urged by high authorities as a reason for reducing the number of the Lords of Session. Unbiased witnesses, even in Edinburgh, will say that, excluding the law officers of the Crown, perhaps as many men fit to be Judges are now working as Sheriffs-Substitute as in the Parliament House; and certainly that there are more such among the Sheriffs-Substitute than amongst the Sheriffs-Principal. We have alluded to the late Mr. Glassford Bell and the late Mr. Gillespie Dickson, than whom no men would have given more strength to the judiciary of the Court of Session had they been appointed to that body. Long intercourse with a mercantile community had given them a knowledge of commercial law and practice that it was impossible otherwise to acquire. Yet, so long as either was Sheriff-Substitute at Glasgow, he was, by tradition and prejudice, though not by law, ineligible for the Supreme Court. They could only have been appointed, according to existing usage, had they resigned office, thrown off the judicial habit, and resumed the practice of advocacy.

Commercial, and especially maritime, law has ever been the weakness of the Court of Session, just because the Judges have not had the opportunity of learning at the fountainhead. In a recent case it was stated that a Bond of Bottomry had not been seen there for forty years. A multitude of mercantile questions, many of them involving large interests, come before the Sheriffs-Substitute at Glasgow, Greenock, and Dundee, which never reach the Court of Session, yet each of which conveys its own lesson and gives its own experience. Daily contact with merchants and practical men, and the handling of mercantile documents, place the local Judge *en rapport* with the mercantile mind. The late eminent Town Clerk of Glasgow, Dr. Reddie, did not acquire his intimate acquaintance with commercial law from books and study merely, but from the varied experience of the Burgh Court, forced into prominence and popularity by the unfortunate incapacity of the then Sheriff-Substitute. The three greatest authorities, not only on the maritime law of France, but of the world—Valin, Pothier, and Emerigon—gained all their experience in provincial Courts, where they met just the class of cases that are daily coming before the Sheriffs of Glasgow, Greenock, and Leith. Nothing would do more to strengthen the *personnel* of the Supreme Court, or give more confidence to the mercantile community, than the elevation of a certain number of tried and experienced Sheriffs-Substitute in the same way as is suggested by Lord Bramwell in regard to the County Court Judges. The office of Sheriff-Principal is long since doomed, although by the supineness of Lord Advocates, or the contemptuous indifference of English Secretaries of State, he is allowed to drag on a lingering existence. But if he still stands in the way of improvement in the salaries of the work-

ing local Judges and of the practice of the local Courts, there is no reason why, merely to save his *amour propre*, the Home Secretary and the Lord Advocate should not in the administration of patronage carry innovation a step farther, and if they find the most suitable Supreme Court Judge in a Sheriff-Substitute, make him one *per saltum*. Since Lord Young increased the salaries of the Advocates-Depute, these gentlemen can no longer in reason expect, as they have not, according to common understanding or recent practice, a monopoly of the Sheriffships falling vacant. The Bar and the country, which are alike pleased that men who have too often obtained office by personal favour or political influence should not be entitled as of course, and without further qualification, to become at least Sheriffs, will be not less satisfied to see worthy successors—if such there be—of the Glassford Bells, and Dicksons, and James Campbells of the last generation advanced to the Bench, which any of these would have adorned.—*Glasgow Herald*.

APPOINTMENTS.

Mr. J. COMRIE THOMSON, advocate (1861), one of the Sheriff-Substitutes of Aberdeen, has been appointed Sheriff of Ayrshire, in succession to the late Mr. Campbell.

Mr. W. A. BROWN, advocate (1859), Procurator-Fiscal at Glasgow, has been appointed one of the Sheriff-Substitutes of Aberdeen.

Mr. J. N. HART, Depute Procurator-Fiscal at Glasgow, succeeds to the office vacant by the resignation of Mr. Brown.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF ABERDEEN, KINCARDINE, AND BANFF.

Sheriff SCOTT-MONCRIEFF.

POOR—LONGMORE v. MASSIE, 12TH FEBRUARY 1883.

Breach of Promise of Marriage—Action at the instance of the Man—Nominal Damages—Expenses.—Observations upon such actions instituted by male pursuers. In this action, which was tried at Banff and decided in February last, James Longmore sued a married woman named Massie for breach of promise—damages being laid at £500. The Sheriff-Substitute found for the pursuer, assessed the damages at 1s., and declined to award any expenses to either party. The following note accompanied the judgment:—

“*Note.*—The pursuer has brought into Court a very peculiar, but at the same time a very competent action. The questions which it raises are essentially jury questions, and I have answered them as I believe they would have been answered by any sensible jury in the country.

“Upon the first question, viz., Whether there was an engagement to marry between these parties, I decide in favour of the pursuer. I see no reason to doubt that the various witnesses on both sides are giving us their real impressions of the conduct of the female defender. To some she appeared in earnest, to others she seemed to be treating the whole matter as a joke—probably for the good reason that she did not herself contemplate it at all times in the same light. From some points of view, marriage with such a man as the pursuer presented a ludicrous aspect. He was young enough to have been her son—apparently of a rather weak character, and a pauper depending upon the charity of his relatives. But, on the other hand, her age limited her choice, and there was a possibility of the pursuer becoming the possessor of money upon the death of his grandfather. That the female defender succeeded in impressing others with the idea that she was seriously contemplating this act of marriage is, I think, proved by the evidence of the Scotts and of Mrs. Blanchard or M’Intosh, which it is impossible to get over. The fact that she may have joked about the matter on other occasions does not weaken their testimony. She may never have been serious at all, but if she could deceive her friends and neighbours, it may be easily believed that she was able to deceive the pursuer; and if one party leads the other to believe that a marriage is really to take place between them, that is sufficient for the purpose of deciding such a question as this.

“But one which is much more important remains for decision. The pursuer may be entitled to a verdict, but is that to carry anything with it? The answer to this question depends upon the pursuer’s own conduct, the motives which have led to the action, and the loss which he may be able to prove has been sustained by him.

“At once I am met with a difficulty arising from the fact that the pursuer is, in the present case, a man and not a woman. Men have many advantages over women in the journey of life, but in actions for breach of promise the position of the latter is unquestionably more favourable. I am left without precedent in assessing the damages, being not aware of any case in which they were ever awarded to a man. In Mr. Fraser’s *Husband and Wife*, I notice that in treating of such damages he most naturally uses the feminine pronoun throughout, when referring to the pursuer. The truth is, that marriage is of much greater importance in the life of a woman than in that of a man; and the loss of marriage is consequently to her of much greater consequence. ‘There is no doubt,’ to quote the learned author already referred to, ‘a certain rank of life in which marriage is regarded as a livelihood in which girls cannot well afford to indulge in the luxury of sentiment, and a man who will keep a house over their heads and find them bread to eat, has an independent value of his own, totally apart from the affection he may or may not have inspired in them.’

“I need hardly remark that it is from this rank of life that our actions for breach of promise usually come. Now it is obvious that the consideration suggested in the above quotation cannot apply to the case of a man. The man who looks out for a woman whose roof is to shelter him, and by whom he is to be supported, would receive little compassion from a jury of his countrymen. Further, the wounded feelings of a woman, although she can plead nothing else, might excite pity, even when exhibited in a public Court; but in the opinion of his fellow-men, such feelings ought to be concealed by every man worthy of the name.

“It is therefore difficult for a male pursuer, in a case of this nature, to succeed in convincing either judge or jury that he is entitled to substantial damages. I can conceive a case in which a man might recover them—a case, for example, in which there had been outlay upon his part, acting upon the faith of a woman’s promise who had deceived him. But this is not the case with which I have to deal. On the contrary, I see more than one reason why the pursuer must rest contented with a simple verdict, and nothing more.

“In the first place, there has been no patrimonial loss. Upon this fact I need not dwell,—such loss not being pleaded as a ground for damages. In the next

place, the very age of the female defender, although in one sense it may aggravate her offence, detracts from the value of the possession which the pursuer says he has lost. A man is not usually congratulated when he marries a woman nearly twenty years his senior. But a far more important ground upon which to base a refusal of substantial damages has been established by himself. He has told us that this woman is of most immoral character, that after they were engaged she continued in spite of his remonstrances to cohabit with other men. It is of no consequence whether his story is true or false. It tells against him both ways. If true, then he has made an escape, rather than sustained a loss; and if he does not think so, he is a man whose feelings it is impossible to respect. Should this story be false, and concocted for the purposes of this action, as I am sorry to say other evidence in the case suggests, then he has deliberately told the most dastardly lie which a man can tell about a woman, and is at once thrown out of Court. Again, the conduct of this man in going to the female defender's house after her marriage, points either to their quarrel having been got over, or at all events to the wounds received being of a less serious nature than he now makes them out to have been. We have no case here of injured affection—for the simple reason that there is no trace of affection having ever existed upon the pursuer's part from beginning to end of his courtship. Of mortified vanity and rage there are traces, but these are not feelings which a court of justice will compensate. After the pursuer heard what the female defender had done, he seems to have consulted some of his acquaintances, for they do not deserve the name of friends, who excited his desire for revenge, and acting upon their pernicious advice he has brought the present action. The conduct of the witness George M'Intosh, who admits that he told the pursuer an arrant lie, deserves to be noted for special condemnation.

"To all this must be added the fact that there is not a little to excuse the female defender in drawing back from her promises. The law expects a man to support his wife. This the pursuer cannot do, and in all probability will never be able to do. If one witness is to be believed, the pursuer must have been told by Mrs. Massie, even before her marriage, that all was over between them. I am very far from saying that she is justified in her conduct. But by the exposure which this action has led to, and the costs which it will involve, she has been, I think, quite sufficiently punished.

"The rule is clearly established, that when the action does not affect character, nominal damages do not carry with them expenses. I need only refer to the case of *Paterson*, 30th May 1849, 11 D. 1085. To this rule there may be exceptions, but the present case cannot prove one. Nor can it be said that it was an action necessary to vindicate the pursuer's character. If it was, he has most certainly failed to do so. W. G. S.-M."

Act. Watt—Alt. Allan & Soutar.

Notes of English, American, and Colonial Cases.

SHIPPING.—*Marine insurance—Barratry leading to seizure—Warranty free from seizure—Proximate cause of loss.*—The plaintiffs insured a ship with the defendants by a time-policy against the ordinary perils, including barratry of the master. The subject-matter of the insurance was warranted 'free from capture and seizure, and the consequences of any attempt thereat.' While the policy was in force the ship was seized by a foreign government, in consequence of the master having barratrously engaged in smuggling. In an action to recover from the underwriter the expenses incurred by the plaintiffs in obtaining the release of the ship,—*Held* (affirming the judgment of the Queen's Bench Division), that the defendants were not liable, and that the warranty extended to the seizure, although it was caused by a barratrous act.—*Cory & Sons v. Burr* (App.), 51 L. J. Rep. Q.B.D. 468.

THE JOURNAL OF JURISPRUDENCE.

THE SCOTTISH SCHOOL OF JURISPRUDENCE.

SCOTLAND, though isolated by her geographical position from the greater field of European thought, and more than isolated from her sister kingdom by the long lingering memory of a war of independence, has yet taken part with the great Continental jurists in developing the Science of Jurisprudence in progress towards a cosmopolitan system. The political interests and national sympathies which made the Tweed an impassable barrier between Britons of the North and Britons of the South, bridged over the North Sea and bound Scotland to Europe. This connection had its natural effects on Scottish Jurisprudence, for the countries through which it was maintained were those of Cujas and of Groot. The Achaian League had linked Scotland to France, traditionally at least, from the days of Charles the Great; till in the sixteenth century the relationship between the two nations had passed into a proverb:

*“ Qui la France veut gagner
A l’Ecosse faut commencer.”*¹

Royal alliances brought courtly Frenchmen to Scotland, and royal disputes sent Scottish soldiers into the service of the French kings. But it was perhaps more in an academical sphere than in any other that the Scot in France was famous. There were Collèges des Ecosais at Paris, Douai, and Reims. The names of Scottish principals and professors are to be found during the fifteenth and sixteenth centuries on the records of all the universities of France. Cardinal du Perron found for Scotsmen more academical offices in his own country than were then to be

¹ *Les Ecosais en France, Les Français en Ecosse*, par Francisque Michel, London 1862, i. p. 39.

counted in theirs. "Go where you will," said the French, "you will meet a Scottish professor or a Scottish pedlar."¹ At the time when James VI. united in his person the sovereignties of England and Scotland, the municipal council of Angers was soliciting "*Monsieur du Barclay, Escossoys, l'un des grands personages de ce temps*," to lecture on jurisprudence in their city.² There were hardly so many Frenchmen here as there were Scots in France during this period, but France and French notions had nevertheless a powerful influence with us. No Scotsman's legal education was considered complete until he had attended some French university, just as Scottish churchmen usually considered it their duty to attend the Sorbonne. Sir Thomas Craig of Riccarton, for example, studied at Paris, and his son, Sir Lewis, at Poitiers. Our institutions, municipal, academical, and legal, were to a large extent moulded after purely French forms. King's College in Aberdeen was an exact model of the University of Paris, and the College of Justice imitated its Parliament. We have adopted French forms of legal process, as, for instance, the investigation into crimes by a procurator-fiscal; and our old form of assignation is a French style;³ while our legal technique bristles with terms and turns of phrase, the Gallic ring of which contrasts vividly with their Saxon synonyms in use besouth the Border.⁴

Less influence than that of France upon Scottish civilisation, yet more perhaps upon the immediate development of Scottish Jurisprudence, must be ascribed to Holland. The United Provinces were to Scotland in the seventeenth and eighteenth centuries pretty much what France had ceased to be. The Reformation bound us to the Dutch in close religious sympathy, and reciprocity in trade riveted the union on its secular side. Scots men-at-arms, Scots professors, and probably Scots pedlars, were then popular in the Low Countries, while their colleges were schools of law for Scottish students. Stair visited Salmasius at Leyden, and must have been familiar with at least the teaching of Noodt and the Voets.⁵ Thus, when we find in Scottish jurists a respect for the Civil and Canon Laws, and a wide acquaintance with the doctrines of Continental publicists, we need not hesitate to ascribe these characteristics to the influence which an international connection with France and Holland has had upon the history and jurisprudence of this country.

But the vital force of an organic growth works from within.

¹ Sir William Hamilton, *Lectures*, ii. p. 393.

² Guillaume Barclay, *jurisconsulte écossais*, par Ernest Dubois, Nancy 1872, p. 12.

³ M. Bell, *Lectures on Conveyancing*, i. p. 297.

⁴ A list of these is given in M. Francisque Michel's *Critical Inquiry into the Scottish Language*, Edinburgh 1882, p. 161.

⁵ *Memoir of Sir James Dalrymple*, by Æ. J. G. Mackay, Esq., p. 54.

The closest connection with outward nations will not produce, though it may aid and modify, a national jurisprudence. There was a close connection between the native Indians and the European settlers in North America, yet the red-skins did not evolve a political theory based on the absolute equality of mankind. It is rather by reference to the character of the Scottish people, therefore, and to the mode of teaching which formed that character, that the essential qualities of the Scottish School of Jurisprudence can be accounted for. A deep and fervent religious spirit has always been a prime characteristic of the Scots. In no other country was the Reformation so rapid or so complete as in theirs. A nation led by John Knox would have no English compromise, no "halting between Jehovah and Baal," as in later times it would have none but a covenanted king. They looked on law as a thing given by God to man for his better guidance, and so, when law came to be taught as a science, it was regarded as a branch of the wider science of morality. The ethics of Aristotle then formed the groundwork of the moral doctrine of the Scottish Universities, and the manner in which this science was taught reveals another historical trait of the *perfervidum Scotorum ingenium*. In 1687 a Commission of Visitation of the Scottish Universities considers the proposal that ethics should be taught "purged from the Scholastic and Theologic disputes which are ordinary to be found in these tractates, and reduced from the common principles of Natural Reason, the nature of human society, the common passions, humours, and inclinations of mankind; and what experience and observation afford for rectifying these; wherein must not be omitted to explain the nature of civil government."¹ Prudence, thrift, and a careful knowledge of human nature are recognised as peculiarly Scottish virtues in the colloquial epithet "canny," and Scottish philosophy has acquired a European fame as the School of Common Sense. When it is borne in mind that most of our writers on natural law spread the Scottish philosophy in our universities, it will not be found surprising that their works reveal the same confidence in the fundamental beliefs of their nation and the same lucidity of exposition which Cousin has ascribed to their purely ethical teaching. "*Cette vertu salutaire de l'enseignement*," he says, "*a certainement contribué à donner à la philosophie écossaise la parfaite clairté qui la distingue, comme la magistrature morale et sociale dont presque tous ses interprètes ont été revêtus leur imposait une doctrine morale et religieuse qui répondit à l'attente de leur auditoire, à celle du pays tout entier et des autorités civiles et religieuses dont ils relevaient.*"²

Scottish Jurisprudence as a scientific system dates from the year 1681, when James Dalrymple, First Viscount Stair, published

¹ *History of the University of Edinburgh*, by Andrew Dalzel, Edinburgh 1862, vol. ii. p. 220.

² *Philosophie Ecossaise*, par M. Victor Cousin, 3me ed., Paris 1857, p. 18.

his *Institutions of the Law of Scotland*. There had been many previous writers on Law. A royal jurist had already laid it down that kings should rule by their laws as God did by the laws of nature.¹ But it was not until Stair's work had appeared that Scottish Jurisprudence was firmly founded on a philosophic basis, the Law of Nature as interpreted by human reason. It needed a man of wider knowledge and defter skill than a merely practical lawyer to accomplish this. "No man," says Stair himself, "can be a knowing lawyer in any nation who hath not well pondered and digested in his mind the common law of the world." He had ample opportunity for acquiring a thorough acquaintance with this common law, and a power of thought well trained to its digestion. His life's experience (1619-1695) was drawn from college, camp, and court. He passed from the student's bench to an academical chair, from the bar to the judicial bench, thence to the seat of president in our Supreme Court. Incidents in his domestic life have furnished matter for a sad romance:² in his public life he was familiar with the byways of diplomacy, and the highway of philosophic and religious thought was not shut against him by his banishment. And to the reception of this varied knowledge he brought a mind which embraced in its scholarship the philosophy, theology, and physical science of his day, which was subtle in conception, clear and skilful in exposition, methodical in its daily practice, and at all times irradiated by a lofty piety. The Scottish School of Jurisprudence has no greater name upon its roll than that of its founder.

Stair declares Law to be the dictate of reason determining every rational being to that which is congruous and convenient for the nature and condition thereof.³ Man's voluntary actions, like those of God, are holy because they are congruous with his nature.⁴ The permanent belief of mankind has been in one God,⁵ perfect and omnipotent, who has given to man a love of mankind, a love of self, and an inbred principle to prefer the interest of the whole to the interest of a part.⁶ The law of nature is identical with the moral law,⁷ and is revealed by Conscience, the light of nature.⁸ Those are most happy whose laws are nearest to equity [the law of nature], and most declaratory of it, and least altering the effect thereof.⁹ Justice is the inclination in the will to observe and follow the dictates of reason.¹⁰ Freedom is the hability of self-determination upon a rational motive.¹¹ These principles have received little or no modification in the development of our

¹ King James VI., *Basilicon Doron*, quoted in Bacon's *Advancement of Learning*, Book II.

² Sir Walter Scott's *Bride of Lammermoor*.

³ *Inst.* i. 1. 1.

⁴ *Vindication of the Divine Perfections*, 1695, Meditation ix.

⁵ *Ibid.* Med. vii.

⁶ *Ibid.* Med. xiv.

⁷ *Inst.* i. 1. 7.

⁸ *Inst.* i. 1. 5.

⁹ *Inst.* i. 1. 15.

¹⁰ *Inst.* i. 1. 2.

¹¹ *Vindication*, Med. viii.

science. The perplexed student of the modern editions of our institutional writers, accustomed to protest against the paradox of a commentary which contradicts its text, rejoices in reading these passages in Stair at the absence of the destructive note: "This is no longer law." But there are some passages relating to the permanent and scientific aspect of jurisprudence which in the clearer light of later thought are open to criticism. When he speaks of the origin of law, he confuses natural and positive law. He scouts the idea of a primitive contract and that of the possibility of national custom previous to the constitution of a nation. "And yet," he says, "it is necessary and implied that men must submit to be governed by a law, which could be understood no other than what their sovereign authority should find just and convenient."¹ "Human laws," he says elsewhere, "are added not to take away the law of nature and reason, but some of the effects thereof;"² and again, "Human law is that which for utility's sake is introduced by man."³ This suggests an antithesis between natural law and positive law. Now positive law realizes, does not contradict or take away any of the effects of the law of nature; nor is utility—that will-o'-the-wisp of benighted philosophers—an absolute end for law of any kind. Stair, however, is most cautious in his reasoning, and his first principles guide him so securely that he never actually wanders from the truth. He has constantly in view the basis of reason and nature upon which all law rests, and always returns to it before saying his last word. He is thus free from the common error of those theorists who, forgetting that there is more in life than logic, develope to its syllogistic utmost a theory founded on a half-truth, till in the end they furnish a refutation of their own arguments by a *reductio ad absurdum*. The answer to this objection is, that human life is insufficient to satisfy human aspirations, that human law can never perfectly embody the law of nature; and Stair himself gives it, though still with the confusion of an untenable distinction between natural and positive law. "Natural law," he says, "is in *æquo*; positive law is in *bono* or *utili*. If man had not fallen, there had been no distinction between *bonum* and *æquum*."⁴ In man's higher nature, in the being which he has in common with that Spirit who does not dwell beyond the stars, but in all spirits, there is no distinction between *bonum* and *æquum*; and the happiness of mankind, which may be presumed to be identical with "utility," is, as Stair holds, best attained by striving after the *æquum*. Such doctrines, therefore, as that utility is an object of law, or that human law may contradict the law of nature, if they are to be found in Stair's system, form part of it only as poisons are elements in many a good medicine; for there is certainly no better cure for Benthamism than the study of so wholesome a jurist as Stair. It is interesting in this connection

¹ *Inst.* i. 1. 16.² *Ibid.* 1. 15.³ *Ibid.* 1. 10.⁴ *Ibid.* 1. 18.

to note that the doctrine of the distinction between perfect and imperfect obligations, with which Stair was presumably familiar,¹ does not appear even verbally as a part of his system. It will be seen in the sequel that this doctrine, though it is stated after the Continental writers in the works of later Scottish jurists, was never transcribed by them without some qualification which implicitly struck at the root of the fallacy which it involves, and that in the end it received at the hands of a member of the Scottish School a complete and final refutation.

Stair makes frequent reference to Grotius in support and illustration of his own teaching, and the portion of his work which deals with the municipal law of Scotland is founded on the civil and feudal laws; yet it is instructive to note how he admits broad principles of reason to modify these laws. The civil and canon laws, he tells us, are to be accepted only *secundum bonum et æquum*;² the old definition of obligation in the Civil Law: "*Obligatio est juris vinculum, quo necessitate adstringimur alicujus solvendæ rei, secundum nostræ civitatis jura*,"³ becomes in his hands, "Obligation is nothing else but a legal tie, whereby the debtor may be compelled to pay or perform something to which he is bound by obedience to God, or by his own consent and engagement;"⁴ and it has been pointed out that, in connection with "clauses irritant," he abandons principles of strict feudal law, for principles of reason, with a scientific prescience, which has been confirmed by the subsequent history of the subject.⁵

It would be difficult to overestimate the value of Stair's work. He set Scottish Jurisprudence on the absolute basis in virtue of which it claims to be a science, and, as will be seen, its scientific character has never been lost sight of, even by those who, while professing to cover the whole field of Scottish Jurisprudence, limited their efforts to its development as an art. Within thirty years from the publication of Hobbes' *Leviathan*, which founded English Jurisprudence on nothing firmer than some artificial absolute sovereignty, this Scottish jurist maintained that law might be "handled as a rational discipline, not merely dependent on sovereign will,"⁶ and that, too, before Hutcheson had heralded the School of Philosophy which found in the union of power and reason the only moral basis for Justice and Right. Too often it happens that scientific conclusions are arrived at only after the successive theories of controversialists have jarred through discongruity and paradox; and it is only because the first principles of law, as laid down by Stair, are unassailable, that the Scottish School of Jurisprudence can claim to be at once progressive and self-consistent.

The foundation was laid by Stair: his successors have reared

¹ *Inst.* i. 3. 5.

² *Ibid.* 1. 16.

³ *Pr. I. de oblig.* (iii. 13).

⁴ *Inst.* i. 1. 22.

⁵ Mackay's *Memoir*, cit. p. 162.

⁶ *Inst.* i. I. 17.

the edifice. Henry Home, Lord Kames (1696–1782), was, like Stair, a practical lawyer of wide experience, whom the work-a-day bustle of advocacy and jurisdiction did not preclude from the graver studies of Ethics and Theology. In his time, the Scottish philosophers had established the efficacy of common sense as a standard of truth, and it is on this sense that Kames has based natural law. "We have an innate sense or conviction of a common nature," he says, "invariable not less than universal."¹ This common nature or standard is perfect and right. The laws of nature are rules of conduct that are declared to be such by the common sense of mankind.² Developing these principles, he endeavours to work out a code of equity, a positive system of jurisprudence, that is to say, in which he lays down permanent and universal maxims applicable to the domestic and social relations of men, in so far as these relations are invariable. His work is thus similar in design—though less prolix in execution—to the celebrated treatise of Puffendorf, published nearly a century before. If it be true that the domestic and social relations of men are invariable, then it must of necessity follow that an application of laws of nature, clearly apprehended, to these relations, would yield, as a result, a permanent code of positive jurisprudence. As matter of fact, however, they are not so. Even if the reproach, "*varium et mutabile semper*," be limited to that half of mankind against which it was originally directed, men will still be unwilling to admit that the experience of ages does not testify to the continuous operation of some material, though perhaps only faintly perceptible, change in all of their relations which depend upon their own effort. Human history does not repeat itself. Men are always striving to "turn over a new leaf" in the sibylline book of time. Every human relation is, to a certain extent, a relation of circumstance—be it only of date and locale—and a system of jurisprudence which takes no account of this element, the very essence of which is its variability, deduces into its conclusions the relativity of its minor premiss, while seeking to persuade us that they are as absolute as its major. When, too, the question arises, How is the law applicable to this or that human relation to be declared? the legislator will have to draw his conclusions from premisses which include the variable element before his work can meet the requirements of any actual state of society. It is perhaps for this reason that Kames' work is now of interest only to the historical student of our law. But he, too, kept the scientific basis of law clearly in view, and was thus enabled to add to the special doctrines of Natural Law. He was one of the first to recognise the universal reciprocity of human rights and duties. "If I be bound in duty," he says, "to perform or to forbear any particular action, there must be a title or right in some person to exact that duty from me; and, accord-

¹ *Principles of Equity*, 2nd ed., 1767, p. 9.

² *Ibid.* p. 12.

ingly, a duty or obligation necessarily implies a title or right.”¹ This principle, fully developed and logically applied, must of necessity exclude any distinction between perfect and imperfect obligations, for the essence of that doctrine is that such obligations as charity to the poor and relief to the oppressed involve no corresponding right in those who are benefited by their performance; yet Kames, with questionable consistency, excludes Ethics from the sphere of Jurisprudence, by maintaining that benevolence is a virtue only, and not a duty.² A distinction between virtue and duty, however, even if admitted for the purposes of philosophical exposition, holds only as a distinction of genus and species, of spheres which are concentric, and not mutually exclusive. Joseph Sieg, the Pennsylvanian engine-driver, who last autumn risked death by burning in order to save a trainful of helpless passengers, believed that he was doing his duty. His belief has not been gainsaid by the thousands whose acclamation called his deed an act of virtue, in both the modern and the old Roman sense of the term; and though it is only when acts of heroism like his are flashed before men’s eyes, that the identity of duty and virtue gets the fullest recognition, the fact that it is recognised in an age which has repudiated Romance for critical Realism, goes far to prove that virtue and duty are as absolutely and eternally the same now as they were when Curtius plunged into the gulf that opened in the forum of old Rome.

While Lord Kames was thus pushing his scientific principles beyond the frontier of the sphere of positive law into a *terra incognita* like the country of the Troglodytes in the “Lettres Persanes,” where men were so invariably virtuous as to require no laws to guide them in the realization of their ideal, John Erskine (1695–1768) was erring in the opposite direction. Though he professes to establish a doctrine of Natural Law resting on human reason, and declares that human laws, when they prescribe anything contrary to natural justice, have no coercive force,³ he abandons the scientific conception of jurisprudence, and accepts the definition of law as the command of a sovereign. Like his predecessor, Sir George Mackenzie, whose *Institutions of the Law of Scotland* was superseded by Erskine’s work, he deals with the letter of the law alone, and displays throughout a timid hesitancy in introducing philosophic principles into his work. For example, he simply reiterates the Roman definition of obligation,⁴ which, as we have seen, Stair modified into consistency with a philosophy of law. Erskine’s purpose was to produce a practical treatise which would serve as a tool for practical men. In this he has been eminently successful. His fault is that, while he is careful at the outset to limit his doctrine to the art of law,⁵ he did not

¹ *Principles of Equity*, p. 6.

² *Ibid.* p. 13.

³ Erskine, *Inst.* i. 1. 3.

⁴ *Ibid.* iii. 1. 2.

⁵ In his *Institutes*, that is to say, his “Principles” plunge in *medias res* by

remain true to this limitation. He did not, like George Joseph Bell, his successor, as the authoritative institutional writer on Scottish Law, deal with the art of law alone; but, seeking to unite the science and the art, failed to see that both must rest on the same foundation. "The *sum cuique tribuere*," he says, is good enough for a moralist, but not for a human tribunal.¹ The disregard expressed by practical men for the scientific principles upon which their work must and does proceed, in no way impugns the validity of the principles themselves; but, in this respect, science, which deals with the "*animal*" of Nature, is better off than that which has the "*anima*" for material. A practical electrician, who found that he was able to combine magnet, spool, and tympanum in various forms so as to construct a working telephone, sneered at a theory of isochronous vibrations and undulatory currents: yet a human tribunal declared the right of him who had established the theory, and made the electrician pay for the practical form which his disregard had taken.²

From the foregoing account it will be seen that practical lawyers since the time of Stair, have gradually given more and more prominence to the positive and practical departments of Jurisprudence, and neglected its scientific and philosophical development. This, indeed, is to be expected from the course of modern civilisation. Specialization is the method of later times in every sphere of labour, mental or physical. Modern times have produced no "walking college" in a second Stagyrte. There is no nineteenth century Picus de la Mirandola to write *De Omni re Scibili*. But it must not be supposed that because practical lawyers have neglected scientific jurisprudence, the science of law has languished in Scotland. In this field of mental labour, too, we can trace the work of specialization. Theology, Ethics, and Jurisprudence were in the Middle Ages taught together; indeed, they are all branches of the wider science of making the best of both worlds. In the Scottish Universities, Law was, as has been seen, studied as a branch of Ethics. It is thus that the Scottish School of Jurisprudence count among its members most of the thinkers who make up the Scottish School of Philosophy.

"*C'est dans la route déjà frayée par Platon et par Aristote*," says Cousin,³ "*et où va bientôt paraître Montesquieu, qu' Hutcheson a mis d'abord l'école écossaise.*" Francis Hutcheson (1694–1746) acquired a solid reputation as professor of philosophy in the University of Glasgow, where he lectured in clear though homely style on natural religion, ethics, and jurisprudence. His philosophy of law, which he expounds as a branch of ethics, is founded on Cicero's *De*

declaring Law to be the command of a sovereign, without any consideration of the interpretation to be given to the word "Law."

¹ *Inst.* i. 1. 4.

² *United Telephone Co. v. Maclean*, Court of Session Cases, 1882.

³ *Philosophie Écossaise*, p. 141.

Officiis, Aristotle, Puffendorf, and on the ruins of Hobbes' system, which he pulls down as a preliminary to the establishment of his own. His work has indeed rather a destructive than a constructive tendency throughout. His faith in the absolute basis of law appears in his refutation of the much abused doctrine of the divine right of kings. "In one sense," he says, "every right is divine which is constituted by the law of God and nature. The rights of the people are thus divine as well as those of princes."¹ This simple answer is surely of as much value as the practical refutation of the doctrine offered by the genealogists who undertook to introduce a bend sinister into the escutcheon of the Stuart dynasty. Hutcheson, however, is inconstant in his adherence to the divine foundation of the right of both king and people. Perhaps because his system is mainly a protest against Hobbes, he succeeds only in effecting a compromise between Absolutism and Science. He starts with the old maxim that man was made for society, and, proceeding upon the hypothesis of a social contract, defines law as the will of those vested with just power of governing, declared to their subjects.² But he is himself in the end constrained to abandon the theory of a social contract, and to admit Natural Law, revealed by reason, as the foundation of Jurisprudence. The same spirit of compromise is seen in his qualified acceptance of the distinction between perfect and imperfect obligations; but he rejects, unconditionally, the old division of Natural Law into primary and secondary, maintaining that, even though the former be self-evident and the latter only the result of reasoning, inasmuch as sound reasoning draws absolute conclusions from incontrovertible premisses, an immutable character cannot be ascribed to the one and denied to the other.³ Hutcheson is therefore to be regarded as a pioneer who broke ground for his successors. It was not till after his time that the contradiction between the power of reason and the power of bare authority was stretched to the point at which the latter must give way.

Hutcheson's pupil, Adam Smith (1723-1790), and Smith's contemporary, Thomas Reid (1710-1796), have both acquired wide fame, and have both contributed directly and indirectly to the progress of Jurisprudence in Scotland. But the operation of Smith's own principle of division of labour has rendered the work of each less specially valuable for the jurist than that of the other Scottish philosophers. Smith was specialized in the direction of the new political science which he founded, and his too blind devotion to the great principle of Free Trade made him limit the function of government to a greater extent than the general doctrine of the Scottish School would warrant. Negative duty alone he recognised as binding on the sovereign power. The State, as he regarded it,

¹ *A Short Introduction to Moral Philosophy*, by Francis Hutcheson, LL.D., 3rd ed. 1764, p. 326.

² *Ibid.* p. 117.

³ *Ibid.* p. 123.

was a policeman, and the domain of Morality lay beyond that functionary's beat. Reid, on the other hand, fell into no such error; but he directed his attention more to the purely metaphysical and moral aspects of right and wrong, than to a consideration of their jural relation. In making man's moral liberty consist in the union of power and reason, however, and in establishing a firm standard of morality in the light of nature and the teaching of Christianity, Reid has done much towards vindicating the *de facto* system of Jurisprudence. Yet, as Smith's fame is that of a political economist rather than that of a jurisconsult, so is Reid less the lawyer and more the metaphysician. Smith has proved to demonstration the validity of the ethical law of the reciprocity of human rights and duties, by so applying it to the conditions which govern the production, accumulation, and distribution of wealth, as to found a political science which has all the validity of a science based on physical law. Reid limited himself to the indication and elaboration of the ethical principles themselves, without seeking to attempt their application otherwise than for illustrative purposes to any special science of the world and man. His labours have been the source of fresh results in the hands of later writers on Natural Law.

INJURY BY ANIMALS STRAYING OFF HIGHWAY.

IN the case of *Tillett v. Ward*, L. R. 10, Q. B. Div., 17, the circumstances were as follows:—An ox which was being driven along a street broke away, entered a shop adjacent, and of course did damage. No negligence, it was held, was proved against the custodiers of the animal. The Queen's Bench Division held that the owner was not liable. This is a singular conclusion to arrive at, and so is the reasoning by which it was arrived at. Lord Coleridge laid down the following as clear propositions of law upon the subject:—First, the owner of cattle is bound to keep them from trespassing on his neighbour's land, and he is liable in damages if they do trespass, irrespective of whether the trespass was or was not the result of his negligence. This, at any rate, is clear enough, and as was remarked by the same learned judge in *Ellis v. Loftus Iron Co.*, L. R. 10, C. P. 10: "It has been held again and again that there is a duty on a man to keep his cattle in, and if they get on another's land it is a trespass; and that is irrespective of any question of negligence whether great or small." In that case, the defendants' horse stuck his leg through the wire fence separating the defendants' and plaintiff's field, and injured the plaintiff's horse. This was held a trespass, and the owner of the animal was held liable for the damage consequent upon the trespass, small as it was. Secondly, when both parties are on the highway, where each of

them has a right to be, and one is injured by the trespass of an animal belonging to the other, he must, to maintain his action, show negligence. As stated, we do not understand the proposition. How could the animal be trespassing where its owner had a right to be? Probably what was meant was what is afterwards said by Mr. Justice Stephen: "Where a man has placed his cattle in a field, it is his duty to keep them from trespassing on the land of his neighbours; but while he is driving them upon a highway he is not responsible, without proof of negligence, for any injury they may do on the highway, for they cannot then be said to be trespassing." Thirdly, when a man is injured by a fierce or vicious animal, *prima facie* no action can be brought without proof that the owner of the animal knew of its mischievous tendencies. "In the present case," says Lord Coleridge, "no negligence is proved, and it would seem to follow from the law which I have previously stated that the defendant," the owner of the vagrant ox, "is not liable." From which of these principles does this conclusion follow? Not from the third, because that has to do with the case of a vicious animal, and here there is no allegation that the animal was vicious. The damage was not caused by the animal being vicious, but by the animal being where it should not have been, and where it could not be without doing harm. Not from the second, for that relates to the case of damage done on the highway, while this case is that of injury done by going off the highway. The first case, that of the animal being on the owner's land and straying on the adjacent land, in which case the owner is liable, negligence or no negligence, is the nearest to the present. The owner's right in the highway can hardly be higher than his right in his own land. A bull may have right to be on the highway as he has right to be on his owner's land, but he has no right to go off the one or the other and trespass on some other property. "The owner of an animal is under an unqualified obligation at common law to restrain it from trespassing upon the land of other persons. And he is therefore unconditionally liable as a trespasser himself for any trespass committed by his animate property; *the law conclusively presuming negligence against him, without regard to the facts of the particular case,*" Shearman and Redfield on Negligence, sec. 186. "But," says Lord Coleridge, "we find it established as an exception upon the general law of trespass, that where cattle trespass upon unfenced land immediately adjoining the highway, the owner of the land must bear the loss. This is shown by the judgment of Bramwell, B., in *Goodwyn v. Cheveley*, 28 L. J. 298." The learned judge goes into the question whether a reasonable time "had or had not elapsed for the removal, and the question would not have arisen if a mere momentary trespass had been by itself actionable." The Lord Chief Justice also refers to a *dictum* of Blackburn, J., in *Fletcher v. Rylands*, L. R. 1 Ex. 265. His Lordship proceeds to say: "I could not therefore, if I were

disposed, question law laid down by such eminent authorities, but I quite concur in their view, and I see no distinction for this purpose between a field in the country and a street in a town. The accident to the plaintiff was one of the necessary and inevitable risks which arise from driving cattle in the streets in or out of town." Mr. Justice Stephen observes: "The case of *Goodwyn v. Cheveley* seems to me to establish a further exception that the owner of the cattle is not responsible without negligence when the injury is done to property adjoining the highway, an exception which is absolutely necessary for the conduct of the common affairs of life. I can see no solid distinction between the case of an animal straying into a field which is unfenced or into an open shop in a town." The solid distinction between the cases is just this, that it is usual to fence a field in order to keep people out, and it is not usual to fence a shop because it would keep people out, and the shopkeeper wants them to come in. It would be unreasonable to expect Lord Coleridge to question law laid down by such eminent authorities as those he mentions, but it is not unreasonable to expect his Lordship to understand what they say, and to remember the occasion of their saying it. Neither of the statements referred to can be called, as Lord Bramwell's is called, a "judgment." They were *dicta*, and *dicta* entirely *obiter*. Lord Bramwell's observation was merely illustrative, leading up to the conclusion he arrived at. Let us take this case of *Goodwyn v. Cheveley*, and see what was really said there. The action was by the owner of cattle against the owner of an unfenced field, upon which the cattle had strayed, for having impounded them without having allowed a reasonable time to elapse before doing so. Baron Bramwell, on it being admitted that the men in charge might have removed the cattle before the time they were impounded, held there was no question to go to the jury. The other judges, Martin, B., and Pollock, C. B., thought the case ought to have been left to the jury, the question not being what was a reasonable time for the removal, but what was reasonable under the whole circumstances of the case. It was in giving judgment in a case of this kind that Baron Bramwell made the following observations: "The plaintiff had no right to have his cattle trespass on the defendant's land. The law is this: he has a right to take his cattle along the highway; and certainly if they do go along the highway, and there are no fences in the adjoining land, it is certain that they will stray; therefore the plaintiff cannot prevent it; and as that is a necessary consequence of the enjoyment of the right of using the highway, why it is a necessary evil, I suppose, which those whose lands border on the highway must sustain; but that being the reason of the rule, it extends as far as reason points out and no further." Baron Martin, one of the judges who took the view favourable to the owner of the cattle, said: "I am not aware that defendant could be indicted for not fencing his field

from the road, though most people in this country put fences between their fields and the road. *If a man, however, will not do that, it seems to me that he must put up with some of the inconveniences consequent upon it.* Now one of the consequences is that cattle being driven on the road will stray." Chief Baron Pollock said: "The question is, *if a man who has land adjoining a highway will not do as persons who have any valuable crop growing upon it usually do by fencing, guard the land from the encroachments of cattle going along the highway,* the question is, whether he is entitled to require that the drivers shall remove the cattle immediately, without reference to any other consideration upon the whole earth." We have been thus minute in quotation that it may be seen what it was that was said in *Goodwyn v. Chevelcy*, upon which so much stress has been laid, and the reason for saying it. It just amounts to this, that if a man will not keep his field fenced, as is usually done, he has himself to blame if cattle stray on to it off the highway. Baron Martin seems to intimate that it might be a question whether the owner of a field adjoining a highway could not be indicted for not having his field fenced. It never entered into the head of any human being that a shopkeeper could be indicted for not having his shop fenced.

The whole case is simple enough, as all the cases about custody of animals are when we keep in view the main principle to be applied, and the varying circumstances to which it is to be applied. Cattle are apt to stray, and if they do so they are apt to do damage, and the owner is bound to prevent them straying and doing damage. But in determining what is necessary to prevent them straying and doing damage, we must take into account many things, for example, the place where the animals are. If they are on their owner's own ground, he takes the risk of their straying on his neighbour's land, and he avoids that risk not by keeping a man in charge of them, which would be impracticable, but by keeping up a fence. If they are on the highway, he is in the ordinary case bound to prevent them straying on to the adjacent property, and he prevents them doing so by using just the opposite precaution. He cannot fence and would not be permitted to fence the highway, so he employs what we may call an animated fence. It may be said that people have a right to use the highway for the purposes of trade and traffic, and it is an inevitable risk that cattle will occasionally stray. Be it so. The owner has only right to use the highway subject to the consequences of that inevitable risk, just as he has a right to use his own land subject to the consequences of the inevitable risk that the cattle will stray off it. There is an inevitable risk of straying in both cases. All the fences in the world will not prevent an occasional trespass from one field into another. That it is an inevitable incident of the use of a highway for the purpose of driving cattle along it that the cattle will stray off it, is not inconsistent with the owner being liable for the consequences.

It may be asked, Do we mean to say, then, that the owner would be liable if his cattle which were being driven along a country road strayed into an unfenced field adjacent to the highway? No; the owner of the cattle would not be liable, simply because he is not responsible for the carelessness of other people. In adopting his precautions to prevent his cattle straying, he is bound on the one hand and entitled on the other to take into account the precautions which are ordinarily used and may reasonably be expected from the proprietors of the subjects adjacent, and these vary according to the occupation and use of these subjects. That the owner of cattle is not liable for the trespass of his cattle into an unfenced field adjacent to a highway is not, as has been said by the learned judges in this case of *Tillett v. Ward*, an exception to the general rule that the owner is liable if his cattle trespass; it is an exemplification of another rule, that a person who neglects a precaution which is ordinarily employed, and which can be employed without interfering with the purpose for which the subjects are used, is responsible for the consequences of his own neglect. If the field were properly fenced and cattle were to stray or break into it, off the highway, their owner would be liable, just as he is when they stray off his own land. This exception, as it has been called, does not extend, or, to speak more correctly, this other principle does not apply to the case of a shop adjacent to a street. To fence a shop would be inconsistent with the purpose for which it was intended, and to keep a person on guard from one year's end to the other to prevent the inroad of an occasional ox, is utterly inconsistent with the ordinary conduct of business. Nor is there any real hardship upon the owner of the cattle if he has to take the risk of his cattle straying off the street. The transits are only occasional and brief in duration; and the increased vigilance required in passing through the streets of a town is only temporary. If shops are to exist at all they must be close to a thoroughfare, and consequently to make the shopkeeper liable for the consequences of the risk said to be inevitable of cattle trespassing upon his property, which he would not be if the shop were built close to a field of the cattle-owner in a sparsely populated valley, would be tantamount to saying that there should be no shops at all. There is inconvenience resulting from fixing the responsibility for the risk upon either the shopkeeper or the cattle owner, and the balance of inconvenience militates against fixing it on the shopkeeper. The shopkeeper cannot use precautions to keep bulls out of his shop, and the owner of the bulls can. To make the shopkeeper liable for the risk would be inconsistent with, to use Mr. Justice Stephen's expression, "the conduct of the common affairs of life."

A writer in the *Solicitors' Journal*, commenting upon this decision, says: "Let us put a case by way of illustration, which seems to be somewhat of a poser for the ironmonger's champions.

Suppose a man chooses to leave a field full of tempting corn or grass unfenced from a highway, could it be for a moment suggested that it is just that he should have an action against every person whose ox driven along the highway strayed on such field and ate his corn and grass? We should say not, assuming that due diligence was used to drive the animal off by his owner." We also, as well as the ox's champion, should say not, and we should say so just because the owner, by neglecting the usual precaution of having his field fenced, was in the wrong, and indeed when there was a tempting crop upon it, was putting temptation in the ox's way. But an ironmonger who does not fence his shop is not neglecting a precaution which is usual and which is compatible with the purpose of his occupation; and there is little temptation for an ox to feast upon fenders and fire-irons. D. C.

CHARTERERS' LIABILITY TO DEMURRAGE.

THE desirability of having some well-recognised rule in order to give certainty in the transactions of business, is recognised on all hands; and although the application of the rule may appear to cause hardship and injustice in individual cases, yet it is better that such evils should exist, than that there should be no rule at all, or only an obscure or uncertain one. The construction which has now for many years been put in England and Scotland upon clauses in charter-parties, which specify a certain number of days for loading or unloading, may be regarded as such a rule. According to this rule, the charterer in such cases is bound to fulfil his contract to load or unload within the specified time, and if he does not do so he is liable in damages, although he has been prevented by circumstances beyond his control. This rule appears to work injustice in individual cases, for it seems unjust to hold a charterer responsible in cases where the causes of the delay are beyond his control. Thus it appears not consistent with equity to hold a charterer responsible for delay occasioned by the crowded state of the docks, by frost, by the prohibition of a foreign Government to export the stipulated cargo, by custom-house regulations or restraints, or by alterations in the ship necessary to receive the cargo. And yet the Courts have decided that charterers are responsible for such things. As an instance, reference may be made to the case of *Randall v. Lynch*, 2 Campbell 356, which is a leading case on the point. This was an action on a charter-party for a voyage to Lanceretto, and back to London, in which it was covenanted that the vessel, after taking in her lading, should proceed direct to the port of London, and upon arrival at the London Docks, and after regular report at the custom-house, should discharge the said cargo; that forty days should be allowed for unloading, loading, and again unloading the cargo, and the freighter

might further detain the vessel at his option for ten working days, upon paying £5 per day demurrage. The breach alleged was, that the freighter had detained the vessel in the London Docks for thirty-five days beyond the ten days last mentioned. The defence was that they could not prevent the delay. It appeared that the ship arrived from Lanceretto in the London Docks on the 10th of August, and was reported next day at the custom-house. The forty days stipulated in the charter-party expired on the 22nd of August, but on account of the crowded state of the docks, her discharge could not then be begun, and it was not finally completed till the 6th of October, being about thirty-one days after the expiration of the ten days during which time she might be kept on demurrage at £5 per day. Under these circumstances it was contended for the defendant that this delay was not in any degree to be imputed to him, but to circumstances over which he had no control, and therefore that he could not be liable where there was neither wilfulness nor negligence. But Lord Ellenborough held that the detention of the ship, arising from the inability of the London Dock Company to discharge her, was, in point of law, imputable to the freighter; that the person who hires a vessel must be considered as detaining her, if at the end of the stipulated time he does not restore her to the owner.

The rationale thus given for such decisions is, that when charterers bind themselves to load and unload within a specified time, they voluntarily take upon themselves the risk of being prevented doing so by unforeseen causes. And so we have Lord Mansfield saying, "if charterers will bind themselves by such contracts, they must take the consequences," *Low v. Yates*, 3 Taunt. 387.

While the dicta of these very eminent judges are entitled to the greatest respect, it is questionable whether after all it is wise to construe a contract in such a way as can hardly be believed to have been the sense in which the parties themselves understood it. No doubt, we must take it for granted that the Courts, in resolving to construe these contracts so, had in view the maxim, "*In conventionibus contrahentium voluntatem potius quam verba spectari placuit*," and that they therefore did think that the parties so intended it. And yet it is difficult to see how the *charterers*, whatever we may suppose the *shipowner* to have meant, could have intended to agree to such an unreasonable condition as that he should be liable for frost, embargoes, and the crowding of docks, simply by specifying that he would do a certain act within a specified time. It appears rather that the charterers must have meant that he should fulfil his contract provided he was not prevented doing so by some *vis major*. But allowing for the sake of argument that it is desirable that a hard-and-fast construction should be put upon all such contracts for the sake of simplicity, the question occurs: Is simplicity furthered thereby? It is questionable. What must be the result of such a construction? Simply that charterers will

contract themselves out of it by introducing saving clauses. And if this be the result, where, it may be asked, is the gain, and where is the increased simplicity? The result of the method adopted is, therefore, that instead of having a simple stipulation to construe, you have a stipulation loaded with exceptions. It may be said, however, that it is as easy to get at the meaning of the parties in the one way as the other. This may be so, but it humbly appears that increased simplicity would have been attained if what one can hardly help thinking must have been the meaning of the contracting parties had been sought for in the clause. In such case there would have been no necessity to have recourse to exceptions.

The natural result, therefore, of the construction which has been put upon contracts of charter-party that *specify* a limited time for loading or unloading, is that charterers will either refuse to specify any definite time, or if they do so, will make exceptions to their liability in cases where they are not in fault. And this they frequently do. In *Hudson v. Ede*, 3 Q. B. 412, there was an express stipulation that the charterer should not be responsible for "detention by ice." The decision gave effect to the exception, and it was held that the loss must fall upon the shipowner and not upon the merchant. And in *Fenwick v. Schmalz*, 37 L. J. C. P. 78, an exception was introduced that the charterer should not be liable in cases of "riots, strikes, or any other accidents beyond his control, which may prevent or delay the ship loading a full and complete cargo of coals." The charterer had been prevented loading within the stipulated time by a snowstorm. In this case, however, it was held that "snowstorm" did not fall within the exceptions above specified to the charterer's liability. The Court, however, recognised the validity and operative character of the clause itself, and held the charterer liable solely because in their view a snowstorm was not an "accident," but rather an "incident."

Although, therefore, the policy of so construing the contract as to make it necessary to specify a number of exceptions may be questioned, yet as there are no doubt advantages to be derived from having a fixed rule, the drawbacks to the construction in question may be overlooked, especially as it is impossible to have any system or code of human rules perfect. Besides, it may be said a charterer has no good ground of complaint, seeing that he has a simple remedy at hand. If he thinks he is hardly dealt with when the Courts say, "You have bound yourself to do a certain act within a certain number of days without any qualification, and you must take the consequences," he may be at once pointed to the cure, viz. to qualify his contract by exceptions.

But as physicians advise patients troubled with hypochondria to look away from their troubles, so charterers may be asked in the same way not to contemplate exclusively the supposed unreasonableness of holding them responsible for events beyond their control, but rather to consider their position at common law in this matter of

responsibility for delays. By doing so they will see that there is, if not a more excellent way, at least surely an easier way, of attaining the security which they desiderate, without requiring to have recourse to the cumbrous time clause with its list of exceptions: At common law, when the contract is silent upon the time to be allowed for loading and unloading, the charterer is not responsible for delays caused by circumstances beyond his control. The law implies that each party shall be bound to perform his part of the contract within a reasonable time; but if either is prevented from doing so by causes for which he is not responsible, then the defaulter is not liable. The effectual cure, then, in all such cases is, if objection is taken to the cumbrous method of a time clause with exceptions, to leave the common law to decide their responsibility. Thus in *Ford v. Cotesworth*, 4 L. R. Q. B. 127, a ship sailed under a charter-party which had no stipulation as to the time to be allowed for discharge of the cargo further than that it should be discharged in the "usual and customary manner." Upon reaching her port of discharge, and after she had discharged part of her cargo, the authorities of the town refused to allow any more to be landed, in consequence of a threatened bombardment. The ship was therefore delayed for several days, and a claim was made by the shipowner for damages for the delay. The Court held that he was not entitled to damages, as the charterer was not to blame for the delay. Blackburn, J., observed in the course of his opinion: "But where the act to be done is one in which both parties to the contract are to concur, and both bind themselves to the performance of it, there is no principle on which, in the absence of a stipulation to that effect, either expressed by the parties, or to be collected from what they have expressed, the damage arising from an unforeseen impediment is to be cast by law on the one party more than on the other; and consequently we think that what is implied by law in such a case as this, is not that either party contracts that it shall be done within either a fixed or a reasonable time, but that each contracts that he shall use reasonable diligence in performing his part. Here all that is said is that the cargo shall be discharged in the 'usual and customary manner,' i.e., the master and crew shall take upon them that part which by the custom of the port falls on them, and the freighter shall do the rest. It is difficult to see on what principle delay in an act in which both sides are to concur is, in the absence of a stipulation in the contract, to fall on one more than the other, if neither be in fault. The delay here having happened without fault on either side, and neither having undertaken by contract, express or implied, that there should be no delay, the loss must remain where it falls."

In another case decided previously by Lord Ellenborough, *Rogers v. Forrester*, 2 Camp. 483, the same result was reached in a different set of circumstances. In this case it was covenanted by the charter-

party that the freighter should unload the ship within the usual and accustomed time. It appeared that the ship *Margaret* entered the London Docks with her homeward cargo on the 25th of August, and was reported the following day. On the 31st of the same month, her cargo, consisting of wines, was bonded by the defendant, and he was ready to have received it, if it could have been unloaded; but on account of the crowded state of the London Docks at this time, the ship could not get a berth till the 20th of October, and was not fully discharged till the 26th of that month. If the duties had been immediately paid upon the wines, they might have been landed in a much shorter time; but the superintendent of the London Docks said he had never, since the bonding system was introduced, known a cargo of wines brought by a ship so large as the *Margaret* landed and delivered, but that such cargoes had always been bonded. It was contended that the duties ought to have been immediately paid—that the freighter was liable for the detention of the ship beyond the time when she might have been discharged; and the case of *Randall v. Lynch* was cited as an authority for that position. But Lord Ellenborough said: "In that case a specific period of forty days had been fixed by the charter-party for loading and unloading the cargo. The stipulation in the present case is, that the freighter shall be allowed the usual and customary time to unload the ship in her port of discharge. The question therefore is, What is the 'usual and customary time' for a ship to unload a cargo of wines in the port of London? The answer seems to be, when the ship gets a berth by rotation, and the wines can be discharged into the bonded warehouses. The wines might have been landed sooner by an immediate payment of the duties, but since the bonding system was introduced, this has ceased to be the usual and customary mode of unloading a cargo." The same course of allowing a reasonable time is followed also in cases where nothing is said as to the time to be taken in loading or unloading, and of not holding the charterer responsible for hindrances which he could not foresee. See *Burmester v. Hodgson*, 2 Camp. 488.

It is unnecessary to multiply examples of the implied contract which the Court makes for the parties in such circumstances. The rule which the Court has proceeded upon in such cases commends itself to common sense, and charterers have therefore two ways in which they may relieve themselves of responsibility for events beyond their control, which may have prevented them loading or discharging their cargo, viz. either to make special exceptions in the charter-party if a limited time is given them, or to leave the law itself to construe the contract upon this point for them.

Having said this much with reference to charterers of entire ships, let us inquire into the position of shippers of cargo on board general ships. In such cases the various shippers of cargo frequently contract in their bills of lading to discharge within a

certain number of days. In their case difficulties may arise, not only from obstacles interposed by outsiders or from physical obstructions of various kinds, but they may be prevented discharging by the act of their co-shippers. Take an actual case. A general ship took some silks on board to carry from Rotterdam to London on defendant's account, and upon the margin of the bill of lading, which he excepted, was written, "The consignee to clear the goods in fourteen running days after her arrival in port, or to pay £4 per diem for demurrage." The defendant applied for and was ready to receive his goods within the running days, but, being undermost in the vessel, the delivery thereof could not be made until some days afterwards. "The consignee," said Gibbs, C. J., "by taking to the goods, contracts with the owner of the vessel to perform the terms upon which they have undertaken to convey and deliver them. Those terms are expressed in the bill of lading, and the defendant, by claiming and receiving the silks under the bill of lading, has acceded to those terms. Each consignee undertakes to clear away his goods in a certain time, and, although by the default of others he is prevented from so doing, he is liable to pay demurrage by the terms of the contract, unless the delay be occasioned by the fault of the captain or his crew," *Harman v. Gondolphi*, N. P. 35. Take another case. A vessel laden with brandy belonging to different persons, arrived in the London Docks to discharge, having twenty days, according to the bills of lading, to do so; but as all the shippers chose to discharge into a bonded warehouse, and the number of ships before her for that purpose was great, she was detained forty-six days after the stipulated twenty. With regard to most of this time, all were equally the occasion of the delay; the conflict of rights among the freighters began with the delivery of the cargo, when the undermost, who was least accommodated in point of delivery, paid most in point of demurrage. For Mansfield, C. J., and the rest of the Court, felt themselves bound by the express contract in the bill of lading to give judgment against each for £4 a-day, every day beyond the twenty that his goods were on board, *Low v. Yates*, 3 Taunt. 387.

It may be asked,—In the light of these decisions, can it be said that the law which finds so is the *constans et perpetua voluntas jus suum cuique tribuere*? At the first blush the construction of the Courts is somewhat startling, and certainly does not commend itself as equitable to the shippers. It may be said,—How in the name of justice can you hold a man liable for not doing a thing which he is prevented doing by the failure of the contracting party on the other side to fulfil his part? In other words,—How can the law in justice hold a shipper liable for not discharging his cargo, when he is prevented doing so by the refusal and inability of the captain to allow him to discharge? And many reasons readily occur why the law should not hold him so responsible. If in reply it is said, it is not the captain's fault that he cannot give the

shipper his goods, but the difficulty arises from the delay of the co-shippers. It may be answered, Each shipper has made his contract directly with the master of the ship, without any communication with his co-shippers. With them, indeed, he has nothing to do: why then should he be answerable for the fault of such co-shippers? Further, it is said the filling-up of the ship in order to insure a good freight is a matter entirely in the interest of the shipowner. Why then should shippers be mulcted in damages because of a state of matters which it was the clear interest of the shipowner to bring about? Or if it is thought that the filling-up of the ship is a matter to the advantage of the shippers as well as to that of the shipowner, and therefore in the interest of both parties; still, it may be said in reply,—Granted that it is the interest of both that the ship should be filled, still, as it is not more the interest of the shipper than the owner, why should the shipper alone be visited with the penalty?

It may be observed, however, as it was observed in the case of the charterer of an entire ship: You have yourself to blame for making such a bargain; you should not have bound yourself to discharge within a certain time at all hazards. But if the contract is appealed to, the question comes to be, What is the contract? In *Harman's* case, before referred to, it was "the consignee to clear the goods in fourteen running days after her arrival in port, or to pay £4 per diem for demurrage." Is it reasonable to suppose that the shipper intended to bind himself to discharge within the time specified if he was prevented reaching his goods by reason of other goods above his? Or is it not rather to be supposed that his meaning was that he was to do so, provided the captain was ready to give him them? It does seem unreasonable to construe his contract so as to make him responsible for the delays of the other shippers, and for delay caused by inability of the captain to give him his goods. Lord Tenterden took the view that in such cases, if the consignee cannot get his goods because some other person's goods prevent him, he is not liable for the delay of the vessel; and in the case of *Rogers v. Hunter*, M. and M. 63, and *Dobson v. Droop*, M. and M. 441, he said: "The true principle seems to be this: If the goods of the particular consignee are not ready for discharge at the time of the ship's arrival, he must have a reasonable time for removing them after they are so; if in such a case, using reasonable despatch, he cannot clear them within the stipulated period, from the ship's being ready to discharge her cargo generally, he will not be liable for demurrage till the expiration of such a reasonable time; but when it is expired he will be liable, though the stipulated period, if computed from the time when the discharge of his own goods could have commenced, is not at an end."

Upon the other side, the supporters of the view of the majority of the Judges point to the manifest hardship to the shipowner if

the rule were that each shipper was only responsible for his own delay. They say, the shipowner stipulates with the shippers of cargo that they shall discharge within a certain time after arrival of the ship, and he has nothing to do with the manner in which the cargo is stowed. They further say, if the shippers were not all bound to discharge within the stipulated time, they might combine to delay the ship, and the owner would be without remedy. As an illustration of what is meant; suppose in a general ship A had his goods stowed at the bottom, B immediately above, C on the top. On arrival of the ship, C takes, let us suppose, the total number of days allowed for discharging. A and B have in consequence to discharge on demurrage days. But suppose they in their turn discharge with reasonable despatch. According to the view that each shipper should be allowed a reasonable time to discharge after his cargo is reached although the days have expired, the shipowner would have no claim for demurrage. The reason is that, although C took more than his share of the time, still he did not take more than was stipulated for between him and the shipowner, and consequently no claim would lie at the instance of the shipowner against him. Again, with reference to A and B, he would have no claim against them, because, according to the supposition, they discharged as soon as possible after their goods were reached. The shipowner would in consequence be the loser, and he would have no remedy. By the view which has received the approval of the Court, on the other hand, this injustice has been prevented, and the shipowner has in such circumstances a claim against A and B, the Court leaving them in their turn to work out their relief against C. In this way the supporters of the view say all parties are fairly dealt with. Besides, it is said the view which has found favour with the Court is the necessary sequel to the decisions upon the responsibilities of the freighter of an entire ship who has limited himself to a certain number of days to load or unload. Any dissimilarity between the cases which may be thought to exist is more apparent than real. If then they are similar, it would not, it is said, be advisable to construe the contract differently in the two cases. If the hardship had been very perceptibly greater in the one case than in the other, the Court no doubt might have construed the contract differently in the two cases, notwithstanding their desire for uniformity. But where is the difference of hardship, it is said, between being held responsible for frost or the overcrowding of a port and the delay or carelessness of a fellow-shipper?

Much may thus be said on both sides of this question, as might have been concluded from the weight of authority on either side, and it is difficult to pronounce confidently in favour of either view. There are difficulties on both sides.

The Courts continue to adhere to their former opinions on the point, and in two recent cases it was held that the shippers were

responsible for the delay of their co-shippers. This may be seen from a perusal of *Straker v. Kidd & Co.*, 3 L. R. Q. B. 223, and *Porteus v. Watney*, same reference. In one of these cases there was a cargo of wheat consigned to different persons, with the stipulation that three working days were to be allowed for discharging the whole cargo. An indorsee of one of the bills of lading was prevented from unloading within the "lay" days, because his part of the cargo lay at the bottom of the hold, and the portions immediately above his were not removed within the specified time. The master was ready and willing to discharge, and the consignees to receive the cargo. The Court held the indorsee liable in demurrage.

Upon the whole, then, while on a cursory consideration the decisions of the Court strike one as most unjustifiable, deciding as they do that one man is punishable for not doing a thing which he is willing to do, but cannot get done because of the default of others with whom he has no connection, upon closer inquiry the injustice is found to a great extent to disappear. Whilst thinking of the hardship of the consignee of the cargo, one is apt to overlook the fact that the master is also willing to perform his part, but is prevented by the same causes which present an obstacle to the consignee's fulfilment. And, moreover, as has been already said, the shipowner would be left helpless and a heavy loser if Lord Tenterden's view were taken. Whereas if the course is adopted which has recommended itself to the Courts, whilst the consignee in the first instance is punished for the fault of others, he has his remedy in his right to go against these others for reparation. The decision of the point devolves upon the Court the delicate duty of affixing the loss where neither of the contracting parties are in fault; and, when fairly looked at, it must after all be admitted that the apparent injustice of the course followed by the Courts does not only disappear, but their view, on the contrary, appears in all the circumstances to meet most fully the justice of the case. While then not free from difficulty, the view that a consignee in a general ship is answerable in demurrage although he is prevented getting at his goods by the fault of others with whom he has no connection, paradoxical as it may appear, seems more in accordance with the spirit of the maxim, *Æquitas est justitiæ maxime propria*, than the contrary view. W. B. M.

RAILWAY TUNNELS UNDER HOUSES.

WHEN a railway company, availing itself of the compulsory powers conferred by the Lands Clauses Act, takes land for the purpose of making a tunnel under houses, is it entitled to take a portion of the land under the surface sufficient for making the tunnel, leaving the houses on the proprietor's hands, or must it take the houses as

well as the land ? This is a question upon which there have been several judicial expressions of opinion, but it cannot be said to have been authoritatively determined until the decision of the First Division of the Court of Session in the cases of *Glasgow City and District Railway Company v. Gemmell* and *Macbrayne v. Glasgow, etc. Railway Company*, May 31. The Court held that the railway company was not entitled to take the land without taking the houses. The ground of the decision was briefly this: The 90th section (the 92nd in the corresponding English Act) of the Lands Clauses Consolidation Act says that "no party shall at any time be required to sell or convey to the promoters of the undertaking a *part only of any house* or other building or manufactory, if such party be willing and able to sell and convey *the whole* thereof." The Court held that the ground underneath the house is part of the house, the term "house" occurring in this section being to be taken in the ordinary legal acceptation just as if it had occurred in a conveyance. The Lord President in giving the leading opinion said: "It appears to me that so long as land is unbuilt upon, land is the proper description of the property; but when ground is built upon the *solum* on which the house rests, it is never described as land. The owner, therefore, becomes the owner of house property instead of landed property, and if he conveys his estate, the manner in which he conveys it is by disposing the house without the slightest reference to the soil on which it stands. Now, where there is no question about the minerals, and no division of the surface and underground estate between two different owners, there can be no doubt of the application of the general rule, that the owner of the surface is owner *ad centrum*; or, as Lord M'Laren very properly expresses it, the vertical measurement of his property is indefinite—it has no limit. Therefore, while in the case of land it might probably be quite competent to a railway company to take the underground portion of a landed proprietor's estate—about which, however, I give no opinion—it seems to be abundantly clear that where the property belonging to the owner is a house, the ground on which that house stands is just as much a part of that house as the walls or roof of it, and the ground on which it stands is not a few inches, or a few feet, or a few yards in depth from the surface, but it is the entire underlying strata as far as the imagination can carry one. In short, it is one subject, after the house has been built, and includes not only all the ordinary adjuncts upon the surface, but the whole underground, and upon that plain and simple ground I am of opinion with Lord M'Laren that the railway company cannot, under the 90th section of the Lands Clauses Act, take any part of the ground under a house without taking the whole property if the owners require them to do so, and are able and willing to convey the whole."

As we have already intimated, there had been previous expressions of opinion by various judges upon this question. Indeed,

in *Falkner v. Somerset and Dorset Railway Company*, L. R. 16 Eq. 458, Lord Selborne, sitting for the Master of the Rolls, held that a company which had given notice to take land for the purpose of making a tunnel was bound to take "the land situated immediately above the tunnel." What the grounds of this decision were are, however, not stated, and the question does not seem to have received any particular consideration. But in *Sparrow v. Oxford and Wolverhampton Railway Company*, 21 L. J. (Ch.) 731, Lord Cranworth expressed an opinion, not however necessary for the judgment, to the same effect as this decision of the Court of Session, and upon the same grounds: "Many arguments were urged to show the title of the railway company to make a tunnel. It was said, suppose the manufactory was at the top of a hill, and you were burrowing under it at the distance of 1000 feet, are you then taking *part of the manufactory*? I do not feel myself called upon to answer that question; but if I were, I rather believe that you are, on the principle of the maxim, '*Cujus est solum ejus est usque ad inferos*.' Do you mean to say that if you were an inch below the surface, you would not take a part of the manufactory? It might all fall down if you undermined any portion of it; and I am rather inclined to think that, however deep below, it would be within that enactment. If that has been a *casus omissus*, I think it ought to be construed in a way most favourable to those who have been seeking to defend their property from innovation."

In *Metropolitan Railway Company v. Cosh*, L. R. 13, Ch. Div. 612, Mr. Justice Fry arrived at the same conclusion as the Court of Session did in these cases, although, as we shall afterwards see, not upon the same grounds. It is to be observed that the statement of Mr. Justice Fry was not a mere *obiter dictum*: it was the principle upon which he founded his decision in the case before him. The case of a house or manufactory on the top of a mountain was adverted to, and the obvious answer given by the Lord President in his judgment in the present case: "As to the extravagant case which had been supposed by Lord Cranworth, I confess that I do not feel the least embarrassed by it. If a railway company chooses to drive a tunnel through the bottom of Ben Lomond or Ben Nevis, it is hardly to be expected that the Legislature would pass an Act authorizing such an operation without making some special provision to meet so extraordinary a case, and I do not think that any case of that kind will ever come before a Court of law for adjudication." In short, in the special Act of the Ben Nevis Railway Company there will be a special provision for the special case of the Ben Nevis manufactory. The common law provision is equally applicable to a mountain as to a molehill, but when the case we have to deal with is ordinarily that of a molehill we may apply it in all safety, leaving the Legislature to deal with the case of a mountain.

In one of the cases before the First Division the judgment of Lord M'Laren (Lord Ordinary) was affirmed; in the other case the judgment of Lord Fraser (Lord Ordinary) was reversed. The latter judgment presents to us the other aspect of the question, its aspect from the point of view of the railway company. The railway company averred that the tunnel was to be carried through solid rock, and so could be constructed without detriment to the houses above. The owner denied this, averring that the substratum was largely composed of muddy sand. The Lord Ordinary allowed a proof of these contending averments, and stated that after the proof "the general question would require then to be determined whether a railway company entitled to make a tunnel, but nothing else, is, notwithstanding, obliged to buy all the strata up to the surface, and all the buildings upon the surface, though the tunnel affects these in no way." The First Division held the averments on both sides irrelevant, and consequently a proof unnecessary. It did not matter in the slightest degree, said the Lord President, whether the carrying of this tunnel under the house would be injurious to the house or not. The question the Court was dealing with was not one of detriment but one of right, the right under the statute of the railway company to take a part of a house without taking the whole of it. In any view of the matter, it appears to us that the course of proceeding proposed by Lord Fraser cannot be supported. What would be the use of having a proof as to whether the tunnel could be made without detriment to the house, if, after ascertaining that the tunnel could be made without detriment, it were to be held, on deciding the general question, that the railway company was not entitled to take the substratum without also taking the house, detriment or no detriment?

That the conclusion which the Court has arrived at upon the general question of a railway company's right has been regarded as the sound view, is tolerably evident from the fact that although the case must have occurred over and over again, the railway companies have not contested the point, and it is notorious that these companies are not slow to contest any probable point, the cost of litigation being regarded by them as only a part of their ordinary working expenses. And that the rule which the Court has laid down is that which the Legislature intended to provide, is evident from the circumstance that although, when applying for their special Act, railway companies, and among others the company in this case, have often asked for a special clause enabling them to take land without taking the houses on it, in only one instance, that of the Belsize tunnel, Midland Railway (Additional Powers) Act 1881, has this power been granted.

In determining a question as to the powers conferred by an Act of Parliament, the Court has merely to construe the terms of the Act, and has nothing to do with the policy of the Legislature, wise

or unwise, except, of course, in so far as that it is to be presumed the Legislature did not intend anything unreasonable. But it seems to us that the Legislature acted wisely and with a due regard to the general interest in providing, as they have been held to have provided, that the company is not entitled to take a slice of the ground beneath a house and leave the house on the proprietor's hands. No doubt it might be very convenient for the company to do so, at least for the time; but it would be very inconvenient for the owner. Of course this would not be allowed unless there was assurance of the safety of the buildings, and that no detriment would ensue. But, in the first place, whether the tunnel could be constructed with safety would lead to an inquiry in every case. There would be questions of engineering, questions as to whether there was sufficient ground left between the tunnel and the building, and questions, as the case before Lord Fraser shows, regarding the nature of the substratum, whether it was solid rock or muddy sand. It would be intolerable to involve the owners of property in such inquiries. In the next place, supposing the result of the inquiry was that the tunnel could be made with safety, a house with a tunnel under it is not as desirable a house as one with no tunnel under it. There is always the risk of danger, and always the fear that some accident may happen. The certificates of all the engineers in the world will not disabuse people's minds of that impression. Engineers sometimes are mistaken. The Tay Bridge was considered by engineers perfectly safe, otherwise traffic would not have been allowed on it; yet a gust of wind blew it away one winter night. Not to take over the house as well as the land beneath might also in the course of time prove anything but convenient for the company. Accidents will occur, tunnels in course of time will get out of repair, and it may become necessary to get access to them from the surface. Access could only be allowed on condition of the proprietor of the surface being compensated. In this view of the matter, it is not extravagant to suppose that some enterprising land-jobber might take a fancy for a house over a tunnel as an eligible investment, being, even if it were old and ruinous, very suitable as a building stance. It seems better for both parties, and both for present and for future convenience, that the house should be taken over at once, that a clean cut should be made between the relations of the owner and the company, and that any arrangements made by the company for the utilization of any part of the property acquired, as by letting the house, supposing anybody should be willing to take it, should be on the footing that a fresh start is to be made.

In view of the importance of the result arrived at, it is all-important to see that the right principle for the result has been selected. There is more than one principle by which the result may be arrived at. The view that the Court of Session has taken is wholly founded upon the 90th section of the Lands Clauses Act,

and by holding that the ground under "a house or other building" is part of "the house or other building," because that is embraced in a conveyance of a house. This principle affords no protection to the proprietor of "lands," and lands have a value as a site on which houses may be erected. The principle on which Mr. Justice Fry based his opinion in the case of *Metropolitan District Railway Company v. Cosh*, is wholly different, and affords a more extensive protection to private proprietors. "In the case of a tunnel it is required to take *the land in the ordinary sense from the very centre of the earth to the heaven above*. They cannot take less than that. That seems to me the result of the decisions. That shows that the whole of the land in the ordinary sense is land required for the purposes of the Act, although only a portion is occupied by the tunnel." The railway company can take nothing except under the Act; all that the Act allows them to take they must take, if they take at all; what the Act allows them to take is lands, and that in its ordinary meaning includes not only the surface, but everything upon it. The principle *a centro usque ad cælum*¹ is pressed into the service of both the views taken, that of Mr. Justice Fry on the one hand and that of the Court of Session and of Lord Cranworth on the other; but the mode in which it is made to do service is different. In the former view it is applied in this way, that if you take a certain superficies of lands, you take what is above the lands; in the latter view, if you take "a house," you get what is underneath the house. It seems to us that the true reason is that given by Mr. Justice Fry. In this view the word "lands" is construed in its ordinary sense; in the other view the words "house or other building" and "part" of a house are not construed in their natural meaning as employed in the 90th section, and the meaning of the words is strained in order to get at the result desired. The ground underneath a house—it may be 1000 fathoms below the house—is not in any ordinary sense part of the house or building. No doubt, a conveyance of a house is a conveyance of the ground underneath, even to the centre of the earth, but that does not make it part of the building in any natural meaning of the terms. The provision of the 90th section was not meant to apply to the case to which it has been made to apply. The words "house or other building" and "part" of a house clearly refer to the house regarded as a subject of occupation, not to a house regarded as a subject of conveyance. What was obviously

¹ The maxim *cujus est solum ejus est a centro usque ad cælum* must not be accepted without limitation. If it were, a telegraph company stretching their wires and a man flying his carrier pigeon or a boy his kite through the air above a house or a field, would be guilty of trespass. In *Pickering v. Rudd*, 4 Camp. 219, Lord Ellenborough observed that he did not think it was a trespass to interfere with the column of air superincumbent on the close; that if it was it would follow that an aeronaut was liable to an action of trespass *quare clausum fragil* at the suit of the occupier of every field over which his balloon might happen to pass.

intended was this, that if the company wished to take a house, they could not, suppose it were a mansion-house, take the left wing and leave the central portion and the right wing; or, suppose it were a cottage, take the "but" without taking the "ben," because what would be left on the owner's hands would be valueless to him. Without this provision there would have been no protection in the Act to the owner of a house in such cases. The notice to take lands is a notice to take a certain superficial area. That would have allowed the company to take the part of the house corresponding to this superficial area, but would not have compelled him to take anything an inch to the side of that area. Then there was no need of this provision to compel the owner to take the ground *underneath* the house. That case was provided for by this, that if you took anything you took lands, and "lands" in its ordinary meaning includes the ground underneath.

No doubt it may be said that in the cases in the English Courts on the construction of the 90th section, the case decided by Vice-Chancellor Wigram, referred to in *Dakin v. London and North-Western Railway Company*, 3 De G. and S. 419, *Sparrow v. Worcester and Wolverhampton Railway Company*, 2 De G. M. and G. 94, the leading case of *Grosvenor v. Hampstead Railway Company*, 26 L. J. (Ch.) 731, *King v. Wycome Railway Company*, 26 L. J. (Ch.) 462, *Cole v. West End of London and Crystal Palace Railway Company*, 28 L. J. (Ch.) 767, and even in the cases where the claim of the owner has been rejected, such as *Fergusson v. London and Brighton Railway Company*, 33 L. J. (Ch.) 29, *Pulling v. London, Chatham, and Dover Railway Company*, 33 L. J. (Ch.) 505, and *Steele v. Midland Railway Company*, L. R. 1 Ch. 275, the Court has given to the words in the section a construction which includes a great deal more than the mere structure of the house. They have held to be "part" of the "house," an outhouse detached from the house, a garden, a strip of garden ground, a piece of ground used for the deposit of ashes from a manufactory, and every adjunct necessary to the convenient use of the house. It has even been laid down as a principle that a "house" includes all that would pass by a devise or conveyance of a "house." In *Grosvenor's* case Lord Justice Knight Bruce observed: "The singular manner in which the 90th section of the Lands Clauses Act is worded, gave rise to questions as to the true meaning of the word 'house' contained in that section, whether it was or was not to be considered as used in a more limited sense than that in which the law generally if not universally understands it. But I thought that all such questions had been set at rest, and that for the sake of general convenience, and for the sake of ordinary justice to private proprietors, it had been considered right to read the word 'house' in that section in its ordinary legal sense." But when this principle has been laid down, it has frequently been with a qualification making it cover only what was necessary to

a house as a subject of occupation. Thus in *King v. Wycome Railway Company* (*supra*) Lord Romilly said: "The Courts have held that the word 'house' was intended to comprise such adjuncts as were within its circuit and necessary to its use and enjoyment." Certainly, in no case had anything been held to be covered by the word "house" but what was, or was considered to be, an adjunct and necessary for the convenient use of the house; and it is only fair that the rule laid down that the word "house" occurring in the section of the Act is to be held to cover everything which would be covered by it in a deed of conveyance, should be read in the light of the circumstances of the cases in which it was laid down. But it is an entirely new departure to hold that the word "house" covers not only the adjuncts necessary for its use and enjoyment, but the ground underneath even to the centre of the earth. If to do so is thought to be warranted by the general terms in which the rule has been expressed by some of the English judges, this is just another of the many instances of the evil of stating as the principle of decision a principle overlapping the decision. It seems to us also, that in considering whether the ground under a house down to the centre of the earth is "part of a house," it is better to go back to the terms themselves. By taking a decision which has made an extensive and very liberal construction of the terms of a statute, and adding to that a more extensive and liberal construction still, we are apt to lose sight of the original terms altogether. It is just as in the application of a principle of law, if we consider every new application of the principle and every new application of the application as having an independent instead of a derivative value, regarding it simply as a fresh point of departure, and ignoring the original starting place, we land ourselves in endless difficulties. Possibly it may be said that the ground underneath a house is necessary to its use and enjoyment, and therefore on the principle stated it is to be regarded as part of the house. But this principle would carry us only to the extent to which the substratum was necessary as a foundation for the house; and this would lead us into an inquiry as to the amount and nature of the substratum left,—a course of proceeding which the Court of Session has pronounced against in these cases.

In the case of *Metropolitan District Railway Company v. Cosh*, it was held that a railway company which has acquired the whole land *a centro ad cælum* cannot sell or convey as superfluous land, the land, and consequently the houses on it, above the tunnel. This indeed was held to follow from the principle that the land which a company is entitled to acquire is the whole land *a centro usque ad cælum*, and it was in arriving at this decision that Mr. Justice Fry laid down the principle in question. If it be that this is a sound construction of the terms of the statute,

it just comes to this, that the Legislature has been more careful of the interests of private owners in the provisions made as to acquiring their property than of the interests of the railway company in the provisions as to disposing of land that is found not to be required for making the tunnel. A railway company getting a house on its hands (and it is necessary, as we have seen, in the interests of private proprietors that the company should take it over), must just utilize the subject as best it may. There is no objection to it letting the subject, and if it can find anybody willing to purchase it at a price reduced in consideration of a doubtful title, let it do so. But it is well that in exercising its right to compel private owners to part with their property, the interest of these owners should be amply protected, and this is what has been done by the decision of the Court of Session to which we have called attention. D. C.

Reviews.

A Treatise on the Law of Scotland relating to Law Agents, including the Law of Costs as between Agent and Client. Second Edition. Revised and enlarged. By J. HENDERSON BEGG, Advocate. Edinburgh: Bell & Bradfute. 1883.

THE fact that a second edition of Mr. Begg's book has been called for, is of itself a very strong recommendation. Law books in Scotland circulate among a limited class. 3000 is not far wide of the number of possible buyers, and the law libraries in the various centres make the number of probable buyers more limited still. At the same time no class of book passes through a more severe ordeal. A badly-arranged or inaccurate law book, tested as it is by the everyday experience of practical men, quickly finds its level, and is inevitably extinguished by a cold process of neglect. No eminence of its writer, and no puffing of its friends, can save it from its fate. On the other hand, from the ever increasing mass of decisions of the Law Courts modifying and interpreting the common and the statute law, a well-arranged book on any branch, which enables the bewildered lawyer speedily to master the bearing of the authorities and decisions on particular points within its compass, just as inevitably survives, to the honour and, let us hope, the profit of its author.

Scottish legal literature is, like everything else, undergoing a process of development. While our grandfathers were content with the comprehensive works of the institutional writers, it is essential for us to have special treatises on particular branches. The press of modern legal business, and the rapidity which is essential to its successful prosecution, leaves little time to the lawyer to seek out and apply the decisions and statutes

modifying and extending the principles these great writers expounded, and there has consequently sprung up numerous law books on special subjects, with which the profession has every reason to be satisfied. Some indeed, such as Lord Fraser's *Treatise on Husband and Wife*, have acquired a reputation wherever jurisprudence is studied, while others, in a more limited sphere, have distinctly lightened the labours of the profession.

Mr. Begg's book has been recognised as a most trustworthy, practical, and useful guide to the branch of law of which it treats. There is no call for his appeal for consideration on account of the difficulties arising from the great variety of subjects requiring to be dealt with. He has dealt with these subjects with great judgment, avoiding diffuseness on the one hand, and giving each its due share of attention on the other. By stating the specialties of the various authorities in footnotes, he has been enabled to keep the text concise, thereby giving it a clearness which greatly enhances its usefulness, in our opinion, without detracting from its accuracy, the notes affording ample material for more minute study of the point sought for. The same conscientious labour and care which was bestowed on the preparation of the book is to be seen in the improvements and additions to the second edition. A considerable part of the work has been re-written, and about one-third consists of new matter. The arrangement of the various branches is clear and intelligible. There is a general table of contents at the beginning, and each chapter has a short table of contents of its own. The index also appears to be of the kind which shows that its compiler knew its value. An author who leaves that portion of his work to inexperienced hands—and many do—seriously endangers the success of his book. But Mr. Begg has not sinned in that way. The index is most ample, and, along with the tables of contents we have alluded to, makes the work very accessible and handy. An appendix brings together Acts of Parliament and of Sederunt; regulations for apprentices and intrants, tables of fees, examination papers, and forms which will be found collected nowhere else, forming a most legitimate padding to the book. We congratulate the author on his success, and prognosticate an enhanced reputation for the second edition of his treatise, which we cordially recommend to the profession.

A Handbook of Sheriff Court Styles, etc. By J. M. LEES, M.A., LL.B., Advocate, Sheriff-Substitute of Lanarkshire. William Blackwood & Sons. 1883.

If the science of law in ancient Italy began (and it may be said ended) with the formular process; if the feudal law first took clear shape and consistency in the pages of Marculphus; if the early story of the English common law is another name for the vicissitudes of brieves; if on the shelves of a well-furnished law library nearer

home Dallas of St. Martin's holds a place no less honourable than Craig ; if a Chancery man is nothing without his precedents, and the rules of the High Court of Judicature are in Fleet Street more than principle, and only next to the Acts,—it is surely no derogation of dignity for a Sheriff to compile a book of Styles. No one could be better fitted to undertake so useful and praiseworthy a task, than a judge who has probably put more business through his hands than any other man of his standing. We are reminded by a graceful dedication that the seeds of what is garnered here were sown in the busy court-rooms of Airdrie and Glasgow. They seem to have fallen into soil of the purest formalism ; and the result is a crop of precedents which will make this book a most useful addition to a Scotch law library,—we venture to think the most useful practical treatise which has appeared for years. It will be indispensable for the practitioner in the Sheriff Courts ; and that without any disrespect to the *Book of Styles* recently issued by Messrs. Forrest & Shearer ; for their compilation proceeds on different lines, being in some respects fuller, in many ways less masterly, than the present work. It will be useful also to other persons in practice in Scotland, for such time at least as the long-promised third volume of the *Juridical Styles* is nothing more than a half-despairing hope. It will be, more especially, of the greatest benefit to the younger members of the profession, for whose behoof the preliminary remarks, which treat of the framing of the pleadings and the conduct of the cause, have been principally designed. Both of these divisions contain matter well worthy of consideration by all who have forensic work to do, whether in the Supreme or in the Inferior Courts. We are not aware of any other quarter in our legal literature to which we could turn for hints so valuable. They are the result of a ripe experience on the bench, and we observe that the author does not disdain to fortify his own views by a citation of weighty advice from authorities so competent as Sheriff Gillespie Dickson and Mr. John Naismith. The first portion of the body of the work gives a long list, arranged in alphabetical order,—as is the case with the work all through,—of designations of parties. This is again unique, and must have entailed an immense amount of research. The pleader, in courts high or humble, will now find little difficulty in knowing how to designate his client or his opponent, whether he be so low in the social scale as a mere individual, or soar so high as a public department. But surely a respectable body of orthodox Christians is needlessly slandered, and the inquiring pleader will feel excusably perplexed by the following entry:—"380, General Assembly (2) of Free Church ; (if pursuing) see suggestions in regard to General Council" [which, be it observed, leave us much in the dark] ; " (if defending), *tenuisque recessit in auras*." Passing by the unnecessary conjunction, which may find an excuse in the Virgilian hexameter, we express a general impression when we say that the authorities of

the Free Church came to regret the attempt made in the Cardross case, to resolve their body into a gaseous system of unsocial molecules. The bulk of the book is taken up with styles of prayers applicable to every conceivable case which has come or may come before a Sheriff Court. We have seen many summonses in the Court of Session which would have been none the worse of a collation with these forms. The cases with which we happened to be most familiar are uniformly well—sometimes almost finically well stated; and the notes appended—though mostly so short as to be only suggestive—will guard the unwary against many pitfalls, and guide them to the form which in any particular case they may require. We specially remark the full illustration here given—in some cases there is the additional difficulty of novelty—of forms relating to Contract, Interdict, Liquidation, the Lands Clauses Act, the Presumption of Life Act, Removing, Ship, Succession; and the neatly put notes on Constitution, Passive Titles, the Married Women's Property Act, Reduction and Removing. The forms of Condescendence which follow are, as they plainly ought to be, sketched in open outline, like a telegram, or Mr. Alfred Jingle's *Conversation*. The result is, as the author points out in a too apologetic preface,—which we account the only unsuccessful bit of writing within these boards,—to save a great deal of space without sacrificing efficiency. The difficult task of framing Pleas in Law will be much facilitated by the admirable pages that follow. If the forms seem to the older members of the profession to be concise to the verge of baldness, the excuse or justification must be that their younger brethren have ceased to affect pious words of style, and to write two words with a copulative conjunction where one will do just as well. The long series of Pleas, under the headings Reparation and Ship, will serve as a fair specimen of the sort of work attempted and done in this department. A number of miscellaneous matters are contained in the closing pages of the treatise. Many might have been with convenience contained in the earlier parts of the work. If this fact suggests a doubt as to the advisability of dividing the forms of petitions into distinct parts, separated by hundreds of pages from each other, instead of collecting all the parts (with alternative forms) in the same quarter, it should be remembered that there are also advantages in the system adopted, and that the author, who is in a better position than any critic to judge, has, on mature consideration, come to be of opinion that these overbalance the drawbacks. In conclusion, we heartily recommend an indispensable handbook in which there is not one superfluous page, not one ounce of padding, and (so far as a rapid perusal entitles us to judge) not one misleading formula.

Obituary.

C. A. MILLIE, Esq., Advocate.—We regret to have to record the death of this gentleman. Mr. Millie was called to the bar in 1870; his legal acquirements were of a high order, and he had attained to a considerable practice at the time of his death.

W. R. KERMACK, Esq., W.S.—The late William Ramsay Kermack, Esq., Writer to the Signet, Edinburgh, who died on the 8th May, at his residence in Atholl Crescent, in the sixty-third year of his age, was the last surviving son of the late John Kermack, Esq., also a Writer to the Signet, of Edinburgh, by his marriage with Miss Ramsay, daughter of the late Rev. Mr. Ramsay, minister of Alyth, Forfarshire. Mr. Kermack was born at Edinburgh, in the year 1821, and was educated at the Edinburgh Academy, whence he passed to the University of Edinburgh, where he distinguished himself by taking the first prize in the Conveyancing Class. He was admitted a member of the Society of Writers to the Signet in 1843, and in 1872 he was appointed Fiscal to the above Society. Mr. Kermack married, in 1846, Elizabeth Armstrong, youngest daughter of the late Henry Armstrong, Esq., by whom he has left four sons and three daughters. The deceased gentleman was a member of the firm of Mackenzie & Kermack, W.S., and enjoyed a large and lucrative practice. His business talents were of a high order, and he was universally respected in his profession, while in his private capacity he had a large circle of attached friends.

WILLIAM PITT DUNDAS, Esq., Advocate, C.B.—The late William Pitt Dundas, Esq., C.B., who was for many years Registrar-General for Scotland, and who died on the 17th June, at his residence in Atholl Crescent, Edinburgh, in the eighty-third year of his age, was the youngest son of the late Right Hon. Robert Dundas of Arniston, Midlothian, sometime Lord Chief Baron of the Court of Exchequer in Scotland, by his marriage with the Hon. Elizabeth Dundas, eldest daughter of Henry, first Viscount Melville. Mr. Dundas was born in the year 1801, and was admitted a member of the Faculty of Advocates in 1823, and practised for many years with considerable success at the bar. In 1852 he was nominated Deputy-Keeper of the Privy Seal of Scotland, and in 1856 he was appointed to the office of Registrar-General of Births for Scotland, which he held in conjunction with that of Deputy Clerk Register till his resignation in 1880, discharging the duties with ability and courtesy. Mr. Dundas, who was a magistrate for Midlothian, was nominated a Companion of the Order of the Bath (civil division) in 1876. He married a daughter of Mr. J. Strange, of the Honourable East India Company's Service. His son, Mr. George S. Dundas, is now Sheriff-Substitute at Campbeltown.

The Month.

Police Superannuation Bill.—The following Statement has been issued by the Chief Officers of Police in Scotland in favour of the Government Police Superannuation Bill:—

The chief officers of police in Scotland desire, in the interest of the police generally, and especially of the aged and infirm subordinate officers and constables, to express their satisfaction at the introduction by the Home Secretary, in the present session of Parliament, of a Bill dealing with superannuation allowances to police forces. For years past many of the chief officers of police have repeatedly been applied to by the men under their command for leave to bring their grievances in connection with the Superannuation Question under public notice; and it has only been through their persuasion, and the assurance of successive Governments during the last twenty years that a comprehensive Superannuation Act would be passed, that agitation on the part of the constables has been averted.

The chief officers beg respectfully to solicit your kind attention to the following Reasons and Statements on the subject, in the hope that these may help you to take a view favourable to the passing of this measure, which has been so long looked forward to:—

First.—A Bill to settle this question has, after engaging the attention of different Governments for nearly twenty years, been considered necessary in the public interest.

It is universally admitted that the establishment of a reasonable system of Superannuation would induce a superior class of men not only to join the police service, but to continue in it, and thereby add to the good order and safety of the public. It is well known how difficult it is to obtain the services of fairly educated men of good character, and possessed of the other requisite qualifications, to join and remain in the police ranks. The number of changes in the police force are so great as to seriously prevent efficiency. The safety of the lieges and their property has, in consequence of these changes, constantly to be left to the care of untrained constables. Were it not for the efficiency of the few men who continue in the ranks after undergoing years of training, the force would be such that comparatively little reliance could be placed on it even in quiet times. And this applies with special force to times of public agitation, or when organized conspirators threaten the lives and property of the lieges. It should be recognized that the constable's duties, amongst those who are socially his fellows, are always attended with some unpopularity; and it may be that, under certain exceptional circumstances (and the possibility of such arising cannot be lost sight of), the unpopularity attaching to the members of the police force may become almost intolerable. On an average, the police forces in Scotland lose

annually, through resignations, dismissals, sickness, and death, a large percentage of their men, at an age when they are most useful. At periods of great inflation of trade, when the high rate of wages prevailing in the labour market tends greatly to unsettle the junior grades in the police service, it has in Scotland (where no superannuation fund exists) invariably led to great inefficiency, due to numerous resignations, and to the obligation on the part of chief officers to retain men of indifferent qualification and conduct, owing to the impossibility of obtaining a proper class of recruits to fill vacancies. The disturbing effect on the Scotch police service, produced by the high rate of wages prevailing in the labour market, was especially experienced in the years 1873 and 1874; for whereas in the past five years the changes in the grade of constables in Scotland have averaged 16 per cent. per annum, in the brisk years 1873 and 1874 the changes in the same grade exceeded 30 per cent. per annum. In support of this statement, see Parliamentary Paper, 16th June 1882, and H.M. Inspector of Constabulary for Scotland's Annual Reports. Unfortunately a high rate of wages is invariably coincident with an increase of crimes of disorder and violence, and thus, at such times, it is specially important that the police force should be numerically and otherwise efficient. This usually obliges the several police authorities to grant an appreciable increase in the rate of pay; but before this takes effect the greater part of the mischief is already incurred, and the increased pay can never prove so reliable a retainer as would be the certain prospect of a pension. Moreover, as each increase of pay thus due to circumstances of a temporary character must, for obvious reasons, probably remain a permanent burden on the police expenditure, it may be questioned whether the pension system, which is undoubtedly the more effective, would not in the end prove the more economical. Committees of both Houses of Parliament, inspectors of constabulary, and chief officers of police, are unanimous in the opinion that the police throughout the United Kingdom should be possessed of a definite system of Superannuation. This view is also extensively held by Judges of the various Courts, Sheriffs, Members of Police Committees, and Town Councils.

Second.—The House of Lords' Committee of 1868, and the House of Commons' Committee of 1877, after a patient and exhaustive investigation, and after the examination of a large number of witnesses representing all kinds of opinion on the subject, came to the conclusion that such a measure was imperatively demanded in the interest both of the public and of the police.

The following is from the Report to the House of Lords by the Select Committee appointed to inquire into the County and Burgh Police Systems of Scotland:—

“The Act of 1857 (20 and 21 Vict. cap. 72) establishes no regular system of pensions for members of the police force who are disabled

by wounds or sickness for further employment in the force, or who have served for a lengthened period. In the army and navy, in the police services of England and Ireland, and in the civil service, a system of pensions exists. A regular course of instruction and considerable experience are requisite for the production of a useful police constable; and in the absence of any pensions in the Scottish system, men frequently retire from their employment at the very time their services have become of value to the public. The committee are of opinion that a well-devised scheme of pensions and gratuities would check the disposition of such men to leave the service, and would therefore be highly conducive to its efficiency. Considerable expense must necessarily attend the adoption of a scheme of police superannuation; but this drawback will, in the opinion of the committee, be more than counterbalanced by the advantages that may be expected to result from it."

A perusal of the Report from the Select Committee on "Police Superannuation Funds," ordered on 13th April 1877 to be printed (and which may be obtained from the Queen's printers through any stationer), will throw much light on this question, and dispel many erroneous impressions which may exist regarding it.

Third.—The present position of the Police Superannuation Question in England, while in a very unsatisfactory state, chiefly on account of the want of uniformity in the present system, puts Scotland at a disadvantage; and that it may be placed on an equality with the police in other parts of the kingdom, a comprehensive measure, dealing with the whole question, requires to be passed.

Scottish ratepayers contribute a considerable share of the taxes for retired constables of the English Metropolitan police and the constabulary in Ireland, and it is believed few of them would grudge a reasonable consideration to their own worn-out servants. The Metropolitan police, the Royal Irish constabulary, and the Dublin Metropolitan police are all provided with superannuation funds, which are wholly or partially supported out of the consolidated funds; and all English county and burgh police forces are possessed of what was intended to prove an effective scheme for maintaining a superannuation fund, partly by payments not exceeding $2\frac{1}{2}$ per cent. of the pay from the men, and partly out of the earnings by fees and by the services of the police, with a proviso that any deficiency falls to be defrayed from the local rates. As an instance of the great benefit to be derived even from a limited kind of superannuation, it may be mentioned that during every five years 80 per cent. of the whole Scottish police force, as against 43 per cent. in England, leave the force under fifteen years' service. If a Superannuation Bill be passed for England and Wales only, and the Scotch police are left in their present unique position, the result must necessarily be to draw away many of the best Scotch constables at once to England; for it is a fact that Liverpool,

Lancashire, and other well-paid forces, having solvent superannuation funds, even now compete with great success in recruiting against the Scotch forces, and withdraw from the Scottish service many of its best men. If this has been the case hitherto, when the Scottish forces have continued to look confidently to Parliament for securing to them a liberal provision for superannuation, we may almost fear a very general exodus if these prospective advantages and long-deferred hopes are suddenly extinguished. Dr. Farr, superintendent of the General Register Office in London, in giving evidence before the Select Committee, said that "disabled men were treated with a certain amount of liberality in England, and he thought it would be for the interest of the service in Scotland that constables should be entitled, after a certain number of years, to a superannuation allowance. He did not think any of the police served after sixty years of age, though many of the labouring population continued their own pursuits beyond that period of life. The constable might be called upon any day to fight and encounter some of the roughest part of the population, and to incur danger to his life."

Fourth.—In justice to the police force, and, looking to the nature of the duties they have to perform, a fixed rate of superannuation allowance, after the requisite number of years' service, should be granted.

Although there is no branch of the civil service in which so much risk is constantly incurred of bodily injury and loss of health through exposure and violence than in the police service, yet the police in Scotland is almost the only branch of the civil service in which no proper provision is made for its worn-out and disabled members. This does not arise from any want of inclination on the part of the police to contribute to a superannuation fund, as every police officer, it is believed, is most willing and anxious to have the opportunity of subscribing what may be fixed upon as a reasonable sum. But no superannuation scheme can be established on a sure basis without the sanction of Parliament.

It will not be denied that the duties which require to be performed by the police cause them to have fewer home comforts than those engaged in private pursuits; and on all occasions of public rejoicings or holidays, when every one is bent on enjoyment, the police are deprived of their ordinary rest, and, instead of relaxation, have extra duties to perform and extra risks to run. They are, during their public service, subjected necessarily to an amount of discipline and irksome regulation in their daily lives which labourers or tradesmen would not willingly undergo; and for this reason alone they are entitled to great consideration from the public. They have to be out at all hours and in all weathers, and few can form an adequate idea as to what this means but those who have experienced it. The number of men thrown upon the sick list after every spell of severe weather, in consequence of their continued

exposure, shows the serious nature of the risks of injury to health incurred; and it is well known that no stormy winter ever passes without leaving behind it numerous police officers permanently ruined in health, and unfit for further active service. As a matter of fact, not a week passes in any of our large cities without several constables getting more or less severely hurt while quelling disturbances or apprehending offenders. Another drawback in a police officer's life is, that a very large proportion of the force is on duty every day of the week, Sunday included, while a great number are on duty, week after week and month after month, without a break in their incessant rounds. The policeman has no Saturday afternoon to himself, and, as a rule, he is only allowed to be off duty one Sunday out of three. When cast off in early life, the invalid constable has no alternative but to become a burden on his friends. Even were his strength sufficient to admit of his doing something in the way of labour, he finds he has forgotten the skilfulness of his trade, and consequently he is unable to keep pace with men who have uninterruptedly remained at their handicraft. A constable is prohibited from carrying on private business or discharging any duty not connected with the police force to which he belongs, and he has therefore no means of supplementing his income by any of the many extraneous ways opened to artisans or workmen and their wives. It is but reasonable that men in public life, exposed in a manner unknown to persons in private business, should be able to look forward to some kind of provision in old age, or when injured; and, as has already been said, every man in the police service is willing to subscribe to a fund for this purpose. The benefits to the public service that would accrue from the establishment of a sound superannuation scheme would, it is believed, amply compensate the public for any addition to the rates which might be necessary to supplement the contributions to the fund—more particularly, seeing that no man can by the provisions of the Bill receive the maximum allowance of two-thirds of his pay until he serves twenty-nine years, unless wholly incapacitated in the execution of his duty. And by Section (C) of the Bill, it is provided that a pension or allowance becomes forfeited "if the grantee refuses to give the police all information and assistance in his power for the detection of crime, for the apprehension of criminals, and for the suppression of any disturbance of the public peace." It may therefore be confidently stated, that pensioned constables, on the footing proposed in the present Superannuation Bill, might be counted upon as a valuable reserve police force. The existence of such a reserve, acting in unison with the regular police forces, would tend to the prevention and detection of crime. This kind of service alone would in a great measure compensate for any contribution required from the ratepayers in aid of the fund.

Fifth.—It is desirable that superannuation allowances should be based upon length of service, and not upon age.

It is not suggested here what length of service should be fixed upon before a constable would be entitled to claim his pension; but it is believed that the best means of raising the tone of the police, and getting men to join the service with the view of making it a profession for life, would be to give an assurance that after a certain period they would be entitled to a pension. The beneficial effects such an assurance would have upon the conduct of the police, in restraining them from excess or violation of duty, and in avoiding neglect of duty, would, it is believed, in a very short time prove of inestimable benefit to the country. It may be very respectfully suggested that many of the opponents, and possibly petitioners, against this Bill may not have thought out this question with a very keen regard to what is best for the public welfare. Unfortunately there will always be a part of the community who, from a variety of causes, feel at least lukewarm on any question which tends to render the police service more efficient; but, as already stated, those best able to judge know the importance of maintaining an efficient police force, and admit that to attain this end a proper system of police superannuation is necessary.

JAMES F. BREMNER, } *Conveners.*
JAMES GRANT, }

14th May 1883.

Sunday Laws.—A question of Sunday observance has arisen in this city. The authorities in charge of our park have opened the swings and the boats on the lake to the public on Sunday. The clergy have been "interviewed" on the subject. It would be much more sensible to interview the lawyers, for the legal question is much more important than the religious. For ourselves we are opposed to the innovation, and we put our opposition on the ground that the city authorities have no right to keep up a public place of amusement on Sunday at the common expense. The city own and maintain this park; the citizens are generally taxed to pay for it; many of the citizens are opposed to Sunday amusements; the park is surrounded by the private residences of persons to whom the sight and sound of these amusements is offensive. We say, therefore, the city has no right to suffer them to be carried on. We believe in the legal right of every citizen to take amusement and recreation on Sunday when the public are not made to pay for it, and it cannot in reason be said to disturb the quiet of any considerable portion of the public. For example, we believe that it is right and politic to allow river excursions on Sunday for the recreation of poor people who cannot take them on week-days; but we do not believe that the city authorities have any right to set up and maintain Sunday excursion boats. If people want to swing and sail on Sunday, let them go to some private and secluded resort, where they will not disturb anybody, and where they will themselves pay for their amusement. To religious people who may complain that we are inconsistent in opposing

the keeping open of shops on Sunday and favouring peaceful amusement on Sunday, we say the former is not necessary, the latter may reasonably be pronounced necessary. A man may just as well buy his groceries and cigars and get shaved on Saturday as on Sunday; many a man can get out-door recreation on no other day in the week.—*Albany Law Journal*.

Counsel and Client.—Among the many subjects stirred to the surface by the new-born activity of the junior bar is the question whether a barrister can receive instructions from a client and take a fee without the intervention of a solicitor. The professional law on the subject has recently been laid down by the duly constituted authority. A barrister was asked by certain clients, who did not wish their affairs to go further than one pair of ears, to give his advice directly, and not through a solicitor. He hesitated, and put the case to the Attorney-General, who replied that a barrister might, if he chose, see his client, advise him, and earn a fee without a solicitor being employed, so long as no litigation had commenced. The etiquette on the subject has not, in fact, changed since Sarah, Duchess of Marlborough, used to drive up in her coach to 5 King's Bench Walk to consult Murray, although the practice of communicating direct with clients had fallen so much into disuse that its propriety had been doubted.—*Law Journal*.

Copyright Bill.—The Copyright (Works of Fine Art and Photographs) Bill, which has been introduced into Parliament by Mr. Hastings and some other members, contains, with other useful provisions, a praiseworthy attempt to meet the scandal of photographs, especially of ladies, being exhibited in shop windows and sold without their consent. If the Bill passes into law, it will be more justifiable than at present for ill-natured people to say that such exhibitions and sales are made by the wish, or at all events not contrary to the wish, of the persons represented. After this Bill becomes law, then, whenever any photographic likeness of any person is executed on commission, it will be unlawful for the photographer, or for any other person, whether he owns copyright therein or not, without the consent in writing of the person for whom the work was executed, to sell, or offer for sale, or exhibit in public in any shop window or otherwise, any copy of such likeness, under penalty of the liability to which offenders will be subject of being ordered in a summary proceeding to deliver up to the person for whom the work was executed all copies in their possession and the negative; and resort may also be had, in the case of its being "reasonably suspected" that all copies and negatives have not been delivered up, to the extreme step of granting a search-warrant to search in the daytime the offender's house, shop, or other place, and to deliver up the copies or negatives which may be found to the person for whom the work was executed. It may be rather doubtful whether this provision is all that could be desired. If it were perfectly certain that whenever an offence of this description

ACT OF SEDERUNT

TO

REGULATE PROCEDURE FOR THE ENFORCEMENT OF
ORDERS UNDER THE COMPANIES ACT, 1862,
AND THE BANKRUPTCY ACT, 1869.

EDINBURGH, 21st June 1883.

The Lords of Council and Session, considering that it is necessary to regulate Procedure for the enforcement in Scotland of the Orders of Courts having jurisdiction in Bankruptcy in England and Ireland respectively, in terms of the Statute 32 and 33 Vict. cap. 71, sec. 73; and also for the enforcement in Scotland of Orders made by the Courts in England and Ireland respectively, for or in the course of the winding-up of a Company, in terms of the Statute 25 and 26 Vict. cap. 89, sec. 122,—Do hereby ENACT and DECLARE as follows:—

1. That on production to the Clerk of the Bills of an office copy of any order made by any of the Courts aforesaid, the same shall be registered *in extenso* in a Register to be kept for that purpose in the office of the said clerk, on payment of the fee mentioned in the Schedule annexed hereto; and the said Register shall be open to inspection of all concerned, on payment of the fee mentioned in the said Schedule.

2. That after registration as aforesaid, the Clerk of the Bills shall append to such office copy a certificate subscribed by him of the registration thereof, in the terms mentioned in said Schedule ; and the same being so registered and certified, shall be a sufficient warrant to Officers of Court to charge for payment of the sums recoverable under such order, and of the expense of registering the same, and to use any further diligence that may be competent, in the same manner as if such order had been a decree originally pronounced in the Court of Session on the date of such registration as aforesaid.

And the Lords appoint this Act to be inserted in the Books of Sederunt, and to be printed and published in common form.

JOHN INGLIS, *I.P.D.*

SCHEDULE REFERRED TO.

Fee for Registration of Orders,	.	.	.	£0	5	0
Fee for Search in Register,	.	.	.	0	2	6

Form of Certificate.

“ ‘Registered in terms of the Act 32 and 33 Vict. cap. 71,’ or ‘of the Act 25 and 26 Vict. cap. 89’ (as the case may be), and relative Act of Sederunt, dated 21st June 1883.

“ *Clerk of the Bills.*

“ BILL CHAMBER, EDINBURGH,

188 .”

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF ABERDEEN, KINCARDINE, AND BANFF.

Sheriff SCOTT-MONCRIEFF.

LAURENCE'S SEQUESTRATION, 1ST JUNE 1883.

Sequestration votes for trustee—Confident and conjunct persons—Bank account insufficiently vouched.—Held that the vote of the father of the bankrupt, who founded upon a bill drawn by him upon his son, dated several years before the sequestration, and which had been in the circle, was valid, and objection to it repelled. Where the sole evidence of a bank account was an excerpt from the bank ledger, unauthenticated in terms of the Bankers' Books Evidence Act, and unaccompanied by the relative cheques—held that the vote of the bank must be rejected, the evidence of the debt being insufficient.

In this case the Sheriff-Substitute pronounced the following judgment:—

"Having heard parties' procurators, and made avizandum with the notes of objections lodged for Charles Johnstone and others, and for Messrs. Bisset and others, repels the first objection stated for Charles Johnstone and others, and sustains the second and third of said objections. Further, sustains the first of the objections stated for Messrs. Bisset: Finds it unnecessary to deal with their other objections: Finds that there is a majority of votes in point of value in favour of the election of James Morrison, solicitor, Banff, whom failing, John Graham, merchant there: Therefore declares, etc.: Finds the objectors, Charles Johnstone and others, liable to the objectors, Messrs. Bisset and others, in the sum of £1, 1s. of modified expenses, and decerns.

"*Note.*—The main point raised by this competition relates to the vote of William Laurence, father of the bankrupt. His claim to vote is founded upon a bill drawn and endorsed by him to the bank, and accepted by the bankrupt. The objection to this vote forms No. 1 of those stated for Charles Johnstone and others. It is not without much hesitation that I have repelled that objection. I do so upon the following grounds:—It has never been decided that the mere fact of a creditor founding upon a bill being confident and conjunct with the bankrupt, is a sufficient ground for rejecting the claim. All that the decisions amount to is this, that in such a case the claim 'must be very narrowly examined,' to quote the words of Lord Shand in the recent case of *Tytler v. Walker and Others*, Feb. 28, 1883, S. L. R. xx. 448. An examination of these decisions will show that where the claims of near relatives have been rejected, there has been something suspicious in the documents produced which has strengthened that suspicion with which the law regards all the actings of confident and conjunct persons. The document has either not had the inherent strength of a bill, having been a mere I O U or other acknowledgment of debt, incapable of proving its own date, or otherwise it has been a bill remaining unused for years, or made use of at a period having a startling proximity to the date of the sequestration.

"In *Tytler's* case, in which votes founded upon promissory notes were rejected, these notes were not only held by brothers of the bankrupt, but they appeared to have lain in their hand for a long period without anything following upon them. They had never been discounted, being destitute of the markings which indicate that a bill has been in the circle. It is clear from the opinions of the Lord President, of Lords Mure and Shand, that what they desired, and what they failed to find, was some evidence in corroboration of the *bona fide* nature of the bankrupt's transactions with his brothers. But in the present case, the bill has evidently been discounted, and is marked as having been paid to the bank by the drawer, who is, according to legal pre-

sumption, the creditor. I have come, therefore, to be of opinion that the case of *Tytler* does not govern the one now before me; and that while it is most right and proper that such a claim as the present should be narrowly investigated in the interests of other creditors, I should not be justified in rejecting it as the ground of a vote.

"The remaining votes objected to on behalf of Messrs. Johnstone and others are clearly bad, and were abandoned at the debate. They are founded upon alleged loans insufficiently vouched. After deducting them, the value of the votes tendered for Messrs. Morrison and Graham is £217, 1s. 3d. Turning to the objections taken upon the other side, I have no hesitation in sustaining the first of these, and as by doing so Messrs. Morrison and Graham's majority is secured, it is quite unnecessary to consider the others. That objection relates to the claim of a Bank, amounting to £87, 4s. 1d. The sole voucher produced is a copy of the bankrupt's account with that Bank, which is not authenticated in terms of the 'Bankers' Books Evidence Act, 1879.' This account commences with a balance against the bankrupt. But the proper evidence of such an item is a docquet, as I have already decided in the case of *Cowie*, 25 *Journal of Jurisprudence*, p. 222. Moreover, the account ought to have been accompanied by the relative cheques. Deducting this vote, £139, 18s. 7d. would represent the value of the remainder. I think this is a case for modified expenses. I am not surprised at any of the objections stated on behalf of the unsuccessful competitors. The vote of William Laurence raises a question of great delicacy. On the other hand, some of the objections maintained by their opponents were, in my opinion, unreasonable, and one at least was absurd."

Act. Forbes—Alt. George.

SHERIFF COURT OF FORFARSHIRE (DUNDEE).

Sheriff-Substitute CHEYNE.

TINDALL AND OTHERS v. COX BROTHERS.

Ship—Bills of Lading—Retention of Freight for Inferior Goods—Quality Marks.—This was an action at the instance of Messrs. Tindall and Others, the owners of the s.s. *Euphrates*, of London, against Messrs. Cox Brothers, merchants, Dundee, for £26, 8s. 1d., being the balance of freight due upon a consignment of 1999 bales of jute, which the defenders pled they were entitled to retain as the difference in value between the quality marks of the bales set forth in the bills of lading, and those actually delivered. The pursuers, on the other hand, pled (1) that they were responsible for the bales set forth in the bills of lading, only in so far as the same were received for shipment, and that the master had no authority to sign for goods not received for shipment; and (2) that by the terms of the bills of lading they were not responsible for "quality, contents, and value, or for any markings, inaccuracies, obliteration, or absence of marks, numbers, address, or description of goods."

On 16th March last, the Sheriff-Substitute, after hearing parties' agents as to the effect of the conditions in the bills of lading, and the liability of the owners under them, pronounced the following interlocutor, allowing the pursuers to prove that the bales were not received for shipment at Calcutta:—

"*Dundee*, 16th March 1883.—The Sheriff-Substitute having considered the closed record, repels the additional plea in law stated by the pursuers: Finds that the bills of lading founded on by the defenders in support of their counter claim are *prima facie* evidence of the shipment at Calcutta, on board the s.s. *Euphrates*, of 1999 bales jute, marked as therein specified, but that it is open to the pursuers, the owners of said vessel, to show that the statements in the

said bills of lading as to the quality marks are to some extent inaccurate, and that the goods delivered to the defenders are the goods actually received on board under the said bills of lading: Allows the pursuers a proof to establish this, and to the defenders a conjunct probation; and appoints the case to be enrolled that a diet of proof may be fixed. "JOHN CHEYNE.

"*Note.*—It is clear on the authorities that in a question with the owners a bill of lading signed by their master is, though *prima facie*, not conclusive evidence of the shipment of the particular goods mentioned in it, and therefore I have had no hesitation in repelling the defenders' contention that they are entitled to a judgment in their favour on the pleadings. There is indeed, in my opinion, more to be said for the contention urged by the pursuers, that, looking to the statement in the bills of lading to the effect that the ship is not liable for inaccuracies of marks, it lies with the defenders to establish the correspondence of the marks mentioned in the bills of lading with the marks on the goods actually shipped; but on consideration I think that this contention is unsound, and that the *onus* is on the pursuers to prove the alleged discrepancy. (Intld.) "J. C."

Proof was thereafter led in the case, and from the following interlocutor and note it will be observed that the pursuers' plea was sustained that they are only responsible for the goods in so far as they were received for shipment.

"*Dundee, 7th May 1883.*—The Sheriff-Substitute having resumed consideration of the process: Finds it sufficiently instructed that the goods delivered to the defenders *ex Euphrates*, in the end of January last, were the only goods with the mark 'G M S' shipped on board said vessel at Calcutta; and having regard to this finding, and to the admissions on the record, Repels the defences, and decerns against the defenders in terms of the prayer of the petition: Finds the pursuers entitled to expenses, allows an account of these to be given in, and remits the same when lodged to the auditor of Court to tax and report. "JOHN CHEYNE.

"*Note.*—There can be no doubt of the soundness of the finding in the above interlocutor, unless we are to suppose that a large number of bales were taken out of the ship after being put on board, and replaced by others bearing different quality marks. This is, however, so extravagantly improbable that it could not be admitted without clear and direct affirmative evidence; and as the evidence of the ship's officers, which is the only evidence we have on the point, is negative, we may safely put the supposition aside. But, if the finding be sound, it seems to me to follow as a matter of course that, so far as the owners are concerned, the contract of affreightment, of which the bill of lading is only an incident, has been duly implemented, and the pursuers are entitled to decree for the balance of freight which the defenders retained to meet the counter claim. Nor do I think that the defenders have any good ground of complaint. They have, or must be held to have, known that their bills of lading were only *prima facie* evidence of the shipments. They were warned by the statement in the bills of lading that the ship was not to be responsible for inaccuracies of marks, and they have always their remedy against the shippers and against the captain. The law is—and it is desirable that merchants should clearly understand this—that, notwithstanding what the captain sets his hand to, the ship is only liable for goods actually put on board. These and none others are what her owners undertake to carry and deliver, and these and none others are what the captain is entitled, as the owner's agent, to sign bills of lading for. It was urged that the pursuers should in this case be held liable for the quality marks specified in the bills of lading, on the ground that there had been gross carelessness on the part of their servants in checking these marks. I am by no means sure that the mistakes, or at least the greater part of them, were in point of fact committed in the checking, for I think it

possible that if we had had the cargo book, which was unfortunately, though I make no doubt quite innocently, destroyed by the mate at Hamburg, it might have been found to tally very nearly, if not wholly, with the assortment delivered, in which case it would be natural to conclude that the captain had signed the bills of lading on erroneous information supplied to him by the shippers. But even if all the mistakes did arise in the checking, it may be questioned whether, looking to the fact that there is often a difficulty in reading the quality marks without cutting the ropes, the officers who were engaged in the checking can be said to have been guilty of gross carelessness, and, be that as it may, I do not think their carelessness in checking can render the owners liable for goods not actually shipped. As regards expenses, while I am inclined to think that the action might competently have been brought under the forms of the Debts Recovery Act, the point is so doubtful that I do not think that the pursuers' agent can be blamed for taking proceedings in the Ordinary Court, or that I would be justified in refusing the pursuers their full expenses. It is highly probable that if the action had been brought under the Debts Recovery Act it would have been remitted to the Ordinary Roll, and if that course had been adopted there would have been no material saving.

(Intld.) "J. C."

Act. Messrs. Watt & Caesar, solicitors, Dundee—*Alt.* Messrs. Hendry & Pollock, solicitors, Dundee.

The case has been settled in terms of above judgments by defenders paying principal sum sued for and expenses.

SHERIFF COURT OF FORFAR.

Sheriff-Substitute ROBERTSON.

MITCHELL v. LANGLANDS.

Damage for Injuries by Animals.—Some time ago an action of damages was raised in this Court at the instance of Charles Mitchell, butcher in Forfar, against James Langlands, farmer, Upper Hayston, near Glamis, and James Scott, auctioneer and cattle-salesman, Forfar, craving decree against the defenders conjunctly and severally, or one or other of them, for the sum of £100 sterling, in respect of injuries sustained by Mr. Mitchell at Mr. Scott's Mart on 8th May 1882, by a bull the property of Mr. Langlands, and then in the custody or lawful possession of Mr. Scott, for sale. The defenders denied liability, and pled that the action was irrelevant in respect that a bull was a domestic animal, and that no allegation or averment of previous vice, or previous knowledge of vice, on the part of the owner or custodier was made. Parties' procurators were heard on this plea, and the same having been taken to avizandum, the Sheriff-Substitute (Robertson) on 20th April last issued an interlocutor repelling the preliminary plea and ordering a proof to be led on the merits. In a note his Lordship says:—

"*Note.*—This is an action of damages for injuries inflicted on the pursuer by a bull in the public mart at Forfar, where the animal was being offered for sale. It is argued by the defenders that the action is irrelevant, in respect there is no averment that the bull was previously vicious, or was known to be vicious, by either of the defenders. This argument is probably quite sound in the case of a thoroughly domestic animal like a dog or a cat. These animals are allowed to go about in public places unattended and unmuzzled, being accustomed to the society of mankind; and until a dog exhibits some vicious tendency, or unless it is of a savage breed, the owner is allowed this freedom. If the dog bites some one, it is necessary to aver, in an action of damages, that the animal was previously vicious, and was known to be vicious by the owner. But the case is different with a bull.

A bull is not a thoroughly domestic animal. It is in law only considered a domestic animal when at home, and on the farm or premises of its owner. If it injures any of the servants there, or indeed any of the public who go there, it would be necessary, in an action of damages, to aver previous vice, and the owner's knowledge of previous vice. But whenever the bull leaves home and comes in contact with the public, either on the high road or in a mart, it must be accompanied by those checks which prudence suggests as necessary to the public safety. It is no longer privileged or a domestic animal, and if it injures any one, and an action of damages is raised, the pursuer is not bound to aver previous vice, or the owner's knowledge of previous vice. The same law would hold good in the case of a stallion or a boar. I refer to the cases of *Armstrong v. Clarke*, 34 Jurist 640; *Burton*, 8 Rettie 892; *Hennigan*, 12th January 1882. In the present case the bull was in a public mart, and ought to have been accompanied by such checks as prudence suggests as being necessary for public safety, whether the animal was previously vicious or not. Accordingly the plea of irrelevancy is repelled, and the proof set down for 9th May will go on.

"A. R."

Act. Donald Macintosh—*Alt.* W. Gordon and W. Lowson.

The action was afterwards compromised and taken out of Court.

SHERIFF COURT OF LANARKSHIRE AT GLASGOW.

Sheriff LEES.

M'LEOD v. LAYES.

Civil Imprisonment (Scotland) Act, 1882.—Expenses.—Held that a creditor applying to imprison her debtor must do so at her own cost. The circumstances are detailed in the note to the judgment, which was as follows:—

"*Glasgow*, 18th June 1883.—Having heard parties' procurators on the motion by the applicant, No. 3 of process, refuses the same. "J. M. LEES.

"*Note.*—The applicant brought an action against the respondent for inlying expenses, for aliment for an illegitimate child of which she said he was the father, for certain other promised money, and for expenses of process. For all these I gave her decree. He did not pay them, and under the Civil Imprisonment Act of last year she applied to have him committed to prison for failure to pay. I granted the necessary warrant, and the respondent then paid. For the costs attending that application she now applies; but it is not, I think, in my power to give them. The matter is not a litigation, but only an application to the Court for authority to the creditor to do what formerly she could have done without the authority of Court, and falls to be disposed of without written pleadings, and at a single diet. It will be noticed that the Act does not authorize expenses to be given; and its terms, I think, plainly imply that they are not to be given either to the applicant or to the respondent. Sub-section 4 of section 4 elaborately provides what the Court may award, and it says nothing of expenses. But on turning to sub-section 3 of section 6 it is obvious that the Legislature in sanctioning the statute had in view the question of expenses; for in regard to law-burrows, it is expressly provided that 'expenses may be awarded against either party.' And properly enough, for an application for law-burrows is an ordinary application, while this is a mere sanction for diligence on a decree already granted, and the expenses of that diligence must, I think, be recovered in the same way as before the Act of 1882, and only so far as then competent. It seems to me that it would be anomalous to have a creditor obtaining a decree with expenses of process, and then recovering expenses of executed diligence against his debtor's goods in the Small Debt Court, and of unexecuted diligence against his person in the Ordinary Court. The applicant

also overlooks the fact that the main object of the Act of 1882 was to make the position of civil debtors better, not to make it worse. But the contention of the applicant would make civil debtors not merely liable to imprisonment as of old, but also to the costs of the creditor in applying to the Court for that imprisonment. Now, as I understand, the consistent policy of the law has always been to let the creditor bear the cost of such steps. Accordingly, where a creditor applies to the Court for authority to incarcerate his debtor as in *meditatione fugæ*, he must apply at his own cost, or, if his debtor be imprisoned by him and apply for aliment under the Act of Grace (which is still competent and necessary in some cases), the opposing creditor must bear his own costs. It matters not though it turn out his application for warrant of arrestment or his opposition to the application for aliment was well justified by the event: he cannot recover his costs. Further, as illustrating this same line of argument on principle, it must be kept in mind that by the procedure that took place the respondent was rendered notour bankrupt, and the idea of rendering a person bankrupt, and at the same time pressing him for the expenses of making him a bankrupt is entirely at variance with the procedure in our Courts under the Bankruptcy and Cessio Statutes. I should be reluctant to say, too, that a girl who applied to the Court for warrant to imprison the father of her illegitimate child for non-payment of aliment was to be found liable in expenses if her application was refused; but it would be inequitable to say she could get expenses, but not be made to pay them. Such questions can, in general, only arise amongst persons who are too poor to have funds to attach or goods to sell, and I do not think the Legislature intended to increase the expense of disposing of these questions."

Act. Faulds—Alt. Martin.

SHERIFF COURT OF PERTH.

ST. MARTINS SCHOOL BOARD v. SOUTAR.

Schoolmaster—The right to make Erections on the School Premises at the instance of a School Board.—This was an action to interdict a schoolmaster of a parish to erect a shed on the school premises, and for its removal. The following interlocutor was pronounced by the Sheriff-Substitute:—

"Perth, 29th January 1883.—The Sheriff-Substitute having heard parties' procurators, and made avizandum with the process and debate: Finds that the pursuers have not set forth grounds of complaint entitling them to the interdict and decerniture sought. Therefore assoilzies the defender from the conclusions of the petition, finds him entitled to expenses, and allows an account thereof to be given in, and remits the same when lodged to the auditor of Court to tax and report, and decerns. "HUGH BARCLAY."

"Note.—The Sheriff disregards all the averments on both sides of motives, but looks on the case divested of all such extraneous matters, although he cannot help deeply regretting such averments. It is essential to the educational interest of a parish that the utmost harmony should ever exist between the School Board and their teachers. The absence of such generally will be found to infer blame on both. The utmost indulgence should be allowed to both, and great care taken to avoid trifling causes of complaint, all which are sure to lead to more of a graver complexion. This certainly is a very trifling matter—the erection by the teacher of a small wooden shed at his own expense.

"The two grounds of complaint are, that by the feu-contract the Board are prohibited from placing on the ground any erections other than in stone and lime, with slated roofs.

"It might be doubted whether this is not meant to apply to chief and permanent erections, and not to those of a more subordinate description. A

pig-sty could hardly be held to fall under the condition. But the answer is that the superiors have not complained. If not, it is not easy to perceive how the Board can arrogate to themselves the rights of the superiors. Supposing the defender got even now the consent of the superiors, then the complaint of the School Board would simply be a mere veto, without reasons assigned, which no School Board can assume. The defender offers, that whenever the superiors object, the shed will be removed.

"The other ground of complaint is, that the erection of the shed destroys the '*amenity of the place.*' Amenity is a very vague term, depending much upon *locality* and the *taste of persons.*

"What might be amenity in one place would be deformity in another, and by one person would be estimated a beauty and '*a joy for ever,*' but by another held an object of disgust. Dr. Samuel Johnson could find no other interpretation for this much misunderstood word than '*pleasantness,*' '*agreeableness of situation.*' Assuredly if the amenity of a place is injured, the injury can only or chiefly be felt by those residing on the place.

"It is not likely the defender would commit anything to the injury of his own residence, even though it might be necessary for his personal convenience.

"Even an ordinary yearly tenant may at his own expense do much on the subject of the lease. Where the landlord cannot show cause of complaint because of injury to the premises, he cannot complain. If so, much less can a schoolmaster who holds his house on a much higher title than a tenant.

"H. B."

On the 16th May the Sheriff (Macdonald) affirmed the judgment of the Substitute with additional expenses.

Act. J. D. Keay—Alt. Dow.

SHERIFF COURT OF PERTHSHIRE.

Sheriff-Substitute BARCLAY.

GIBSON'S TRUSTEES v. M'KENZIE'S TRUSTEES.

Trust—Circumstances in which Estate of deceased Trustee held responsible for sum of Trust money.—This action was raised by Wm. Ewan, Broich Terrace, Crieff; James Hay, cabinetmaker, Perth; John Graham, stationmaster, Bowling; and Thomas Love, auctioneer, Perth, surviving trustees and executors of the late David Ross Gibson, hotel-keeper, Perth, acting under a trust-disposition and settlement of date 25th December 1872, against Jas. Moir, accountant, Perth, as factor for the trustees of the late Adam M'Kenzie, Sheriff-Clerk Depute of Perthshire, for payment of £299, 16s., with interest at the rate of 5 per cent. as from 31st July 1873. The late Mr. M'Kenzie was one of the trustees appointed under the settlement of Mr. Gibson, who died on 9th March 1873. Part of Mr. Gibson's estate consisted of a policy of insurance with the British Medical and General Life Association for £300, which fell due on the 30th July, and was paid on 31st July 1873 to Mr. M'Kenzie, as law agent for his co-trustees. The trust was administered continuously up till 31st March 1881, when Mr. M'Kenzie suddenly disappeared. His body being found a few weeks afterwards in the river Tay, it was supposed that he had accidentally been drowned. His disappearance caused an inquiry to be made by the rest of the trustees as to the manner of disposal of the proceeds of the insurance policy, and as it did not appear that they had ever been paid or applied for the purposes of the trust, a demand was made by the pursuers upon Mr. M'Kenzie's executors for payment of the insurance money. On the ground that there was reasonable probability, though not actual proof, that Mr. M'Kenzie had paid or administered the proceeds of the insurance money for

behoof of the trust estate, Mr. M'Kenzie's executors objected to payment of the money out of his estate, and consequently the present action was raised by the pursuers. Sheriff Barclay has now issued the following interlocutor:—

“Perth, 6th June 1883.—Having heard parties' procurators and made avizandum with the process, proofs, and debate, finds as matter of fact—(1) The pursuers are trustees of the late David Ross Gibson, and the late Adam M'Kenzie was also a trustee, and law agent of the trust; (2) Adam M'Kenzie on 31st July 1873 cashed and received £299, 16s., the proceeds of a cheque on the office of the Clydesdale Bank at Perth, being the amount of a policy of insurance for £300 sterling on the life of David Ross Gibson by the British Medical and General Life Association in Edinburgh, for which M'Kenzie was agent in Perth; (3) It is not established that M'Kenzie accounted to his co-trustees or in any way applied or expended said sums for the benefit of the trust, but on the contrary there exists strong evidence that at least portions of the said sum were applied for his own personal benefit: Therefore decerns in terms of the petition: Finds the defenders liable to the pursuers in the expenses of process, allows an account thereof to be given in, and remits the same when lodged to Mr. Smellie, depute clerk of court, to tax and report.

(Signed) “HUGH BARCLAY.

“Note.—It is not necessary that the pursuers should prove that the money received by Mr. M'Kenzie was applied to or for himself. It is sufficient for them that it be proved that he received the money, leaving it to his representatives to show that the money so received was applied for trust purposes. But there is strong proof that they were not so applied. Mr. M'Kenzie was a gentleman justly reputed as most honourable, and had he not been accidentally cut off in the prime of life would assuredly have accounted satisfactorily for the sum received by him. The acting of the trustees, or rather their total remissness of duty, are in nowise matters of commendation. Mr. M'Kenzie was left wholly without superintendence. Unfortunately this is no singular feature of trusts, especially where the number of trustees are large, and consequently the responsibility divided. What is the duty of one of their number is that of any other, and therefore becomes on the issue the duty of no one. It is a great mistake and fallacy to vest the management in a number of trustees. Here there were no less than five trustees to manage a very small estate, and two were resident beyond the district. It is a mistake to suppose that such appointment is complimentary to a friend. Certainly, as recent sad events have proved, the office is accompanied with unlimited and serious responsibilities. One or two well-qualified persons are much better fitted to exercise the functions of trustees than half-a-dozen. Where, however, a large number is nominated it would be well, so as to secure good management and fix responsibility, that a professional factor should be appointed, even though his salary was paid by the trustees themselves.

(Intld.) “H. B.”

Act. Whyte—Alt. M. Stewart.

Notes of English, American, and Colonial Cases.

NUISANCE.—*Rural sanitary authority—Sewers—User of—Vesting of sewers in Local Authority—Remedy of private individual—Public Health Acts, 1872 (35 and 36 Vict. c. 79), 1875 (38 and 39 Vict. c. 55), ss. 17, 21, and 332—Rivers Pollution Prevention Act, 1876 (39 and 40 Vict. c. 75), ss. 2, 3, and 8.—The vesting of sewers in a Local Authority gives them, not an absolute, but a limited right of ownership. They are not in the same position, nor have they the same*

powers, as a landowner through whose land a sewer or artificial watercourse runs.—*The Attorney-General v. The Guardians of the Poor of the Union of Dorking* (App.), 51 L. J. Rep. Ch. 585.

Where a Local Board do not act themselves to create a nuisance, and are endeavouring to put in force their Parliamentary powers and to effect a perfect system of drainage, it is no ground of action to an individual, for damages or for an injunction, that the Board do not take proceedings under their Acts to prevent persons who have no prescriptive right of drainage from draining into sewers vested in the Board (as to a large portion of which there are prescriptive rights), and thus causing an additional and serious nuisance to that individual, and they cannot be said “to use or permit to be used” the sewers so as to cause a nuisance by abstaining from taking such action.—*Ibid.*

No action can be sustained to compel a person to bring an action to restrain the continuance of a nuisance which he is unable physically to put an end to.—*Ibid.*

The Court ought not, by granting an injunction, indirectly to order the carrying into execution of the powers of the Act. If it can make such order, it should make it directly.—*Ibid.*

In granting an injunction, the Court must look at the balance of convenience.—*Ibid.*

SALE OF FOOD AND DRUGS ACT, 1875 (38 and 39 Vict. c. 73), ss. 6, 12, 13, and 14—*Adulterated article—Purchase by private individual—Notification to Seller—Analysis.*—The provisions of section 14 of the Sale of Food and Drugs Act, 1875 (38 and 39 Vict. c. 63), apply equally to the case of a purchase by a private individual under section 12, and by the public officer mentioned in section 13 of the Act.—*Parsons v. The Birmingham Dairy Co.*, 51 L. J. Rep. M.C. 111.

SHIP AND SHIPPING.—*Charter-Party—Construction of—Demurrage—Detention by Frost.*—It was agreed by charter-party between the plaintiff and the defendants that the plaintiff's ship should proceed to Cardiff, East Bute Dock, and there load from the agents of the freighters a full and complete cargo of about 1700 tons of rail iron. Detention by frost, floods, riots, and strikes of workmen, accidents to machinery, or quarantine, not to be reckoned as lay days. There are two docks at Cardiff, the East and West Bute Docks, which are connected by a short canal, and also by a railway which runs along the quays round both of the docks. The West, but not the East Bute Dock, was connected by a junction canal with another canal, the G. Canal. There are five or six manufacturers of rail iron at Cardiff, all of whom, with the exception of C. and Co., have wharves either in the East or West Bute Docks; and who were accustomed to load vessels in the East Bute Dock, either from the quays or from lighters alongside the vessels. C. and Co., the agents of the freighters, had their wharf for the deposit of iron on the G. Canal, and, in order to load a vessel in the East Bute Dock, were accustomed to bring their iron in lighters from their wharf on the G. Canal, along the junction canal into the West Bute Dock, thence along the short canal into the East Bute Dock, where the vessel to be loaded was berthed. The whole cargo of iron was deposited at C. and Co.'s wharf, in anticipation of the arrival of the plaintiff's ship. On her arrival, the ship was berthed in the East Bute Dock, but the loading by means of lighters was interrupted for fifteen days by a frost, which covered with ice the junction canal leading from C. and Co.'s wharf to the West Bute Dock. In an action for demurrage,—*Held*, that the exception as to detention by frost applied only when the iron had arrived at the place named in the charter-party, where the ship was to be loaded, namely, the East Bute Dock; and the defendants, therefore, would not be protected from liability to pay demurrage where the detention was occasioned by frost which rendered impassable the junction canal leading from C. and Co.'s wharf into the West Bute Dock; for the conveyance of the iron in lighters through the canal was not part of the act of loading.—*Kay v. Field and Co.* (App.), 51 L. J. Rep. Q.B.D. 17; *Hudson v. Ede* (37 Law J. Rep. Q.B. 166), distinguished, *ibid.*

THE JOURNAL OF JURISPRUDENCE.

THE SCOTTISH SCHOOL OF JURISPRUDENCE.

(Continued from p. 347.)

ADAM FERGUSON (1724-1816) has been aptly called the publicist of the Scottish School of Philosophy.¹ He had that wide experience of human life under varying conditions, and that familiarity with other nations than his own, which may be said to constitute the knowledge of the common law of the world, which is an essential part of the mental stock of a knowing lawyer. He had the same academical training in theology, ethics, and jurisprudence, and the same familiarity with diplomatic and military affairs, which were noted as occasions of the philosophic excellence of Lord Stair. Yet the bent of his mind lay more towards the historical than the subjective method, and his works are therefore less profound than those of the founder of our school; but the wealth of varied knowledge which they display, and the classic style which he brings to their adornment, form a charm which makes the proverbial saying that law is a dry study "splendidly mendacious." His works speedily acquired a foreign fame: they were translated into both French and German, and his *Institute of Moral Philosophy* served as a text-book in universities abroad.

Ferguson finds natural law in the moral approbation of right action, which is an inherent quality in our nature, and which affords man the means of working out a rule of life for his guidance. In doing so he rebuts a philosophy which would make considerations of gain and loss the only motives of human action. As Cousin points out,² he introduces a new principle in the perfectibility of human nature—the restoration of the broken harmony which results from the discord of man's higher

¹ Cousin, *op. cit.* p. 498.

² *Philosophie Ecossaise*, p. 512.

with his lower nature. He starts with a doctrine of rights, and maintains man's power to defend these, and to vindicate them in accordance with his nature. "Rights," he says, "are the original appurtenances of human nature, or inseparable from it."¹ Men are by their dispositions and their faculties qualified to make the necessary arrangements for the conduct of society, however enlarged."² He poses the family as the foundation of society.³ To establish these principles he is led to strike a blow of stern refutation at the head of the then vaunted principle of Liberty, Equality, and Fraternity, and the doctrine of the absolute equality of men. His life covered the period of the French Revolution, and he had taken a personal part in the diplomatic negotiation between the Home Government and the North American colonies, which had established their independence and founded their constitution, verbally at least, upon the principle which he had to refute. He was thus well qualified to deal with the question at issue; and he saw plainly that if law were to proceed from reason, it must refuse to recognize an argument which justifies the fearless fury of the terrorist. Terror is of the very essence of Unreason, and though the "terrorism of the law" has nowadays become familiar as a phrase, it must be remembered that its use at present is journalistic rather than scientific, and relative only to recent events which, it is to be hoped, are of a thoroughly ephemeral nature. The sounder scientific view is formulated in Hegel's dictum that by the conscious commission of crime the higher nature of man consents to punishment, and Ferguson found in this higher nature the denial of the principle upon which terrorism proceeds. "The object of reason," he says, "can never be to abolish the relation of power and dependence, for this nature has rendered impossible; but to guard against the abuse of power and procure to individuals equal security in their respective stations, however differing in point of original or acquired advantages."⁴ "In the sense of equality, liberty were a mere chimera or vision, never realized in the state of mankind. The nations who contended most for the equality of citizens in admitting the institution of slavery, trespassed most egregiously on the equality of mankind."⁵ This is indeed the view which has in all times gained the practical adherence of all men, however many doctrinaires have supported the hypothesis of absolute equality which it controverts. Whenever the bonds of a bad human law have to be broken, men find in facts a warrant for their release; but whenever there arises a rebellion against law, as law, without reference to its moral quality, this party cry of "All men are equal" becomes the spell which bewitches them into crime. In Ferguson's time it wielded the sheath-knife of Charlotte

¹ *Principles of Moral and Political Science*, 1792, vol. ii. p. 191.

² *Ibid.* ii. p. 293.

⁴ *Ibid.* i. p. 263.

³ *Ibid.* i. p. 27.

⁵ *Ibid.* ii. p. 462.

Corday, and in this later age it has fired the revolver of Vera Sassoulitsch. Nihilism, like many other theories relating to government, is based upon this lie. The propagandist of Nihilism, with more logic than some Radicals of Western Europe, does not limit man's equality with his fellows to the sphere of politics. One of its exponents from within says:—"The fundamental principle of Nihilism, properly so called (*i.e.* as a philosophic and literary movement), was Absolute Individualism. It was the renunciation in the name of individual liberty of all the duties imposed on the individual by society, by the family, by religion. Nihilism was a passionately powerful reaction, not from political despotism, but from the moral despotism which oppressed the private and inner life of the individual."¹ Absolute individualism, the logical result of the doctrine of the absolute equality of men, is thus seen to be the denial of all law, moral and political. If there is to be law, in science or in practice, the gradation established by nature must be recognized. "Man's mission," says a Chinese proverb, "is as much to rise as it is the property of water to fall;"² but the sphere in which this mission is to be accomplished is set by nature in another property of both man and water, that of finding their own level.

Individualism in its only realizable aspect is recognized by Ferguson as the object of law. "Freedom or liberty," he says, "we may conceive to be the genuine fruit of just government."³ But he is far from ascribing to liberty the signification given to it by those who would make it the freedom from every restraint on the individual. Elsewhere he calls it "exemption from injury of any sort, rather than merely an exemption from restraint; for it actually implies every just restraint."⁴ We see in this a recognition of what is now an established doctrine of the Scottish School—the reciprocity of rights and duties. It was perhaps the recoil from the doctrines of the School of Liberty, Equality, and Fraternity which made Ferguson somewhat too eager to limit the sphere of jurisprudence merely to that compulsory law which seeks to vindicate the "*alterum non lædere*" alone of the *juris præcepta*, and leaves out of sight the "*honeste vivere*" and the "*sum cuique tribuere*." "The right of defence," he says, "is the specific principle of compulsory law,"⁵ and by compulsory law he means jurisprudence in general. It is this view which has been so exaggerated by the Negative School of Jurisprudence, and has been appealed to in justification of an evasive policy of neglect. Did it exhaust jurisprudence, it would shut out from the law of nations a doctrine of intervention or aggression, and from municipal law any State organization for the relief of the poor. Ferguson happily does not leave his teaching open to such misinterpretation. By defence he means not only self-

¹ *La Russia Sotteranea*, di Stepniak, Milano, 1882, p. 2.

² Sir John Bowring's translation of *The Flowery Scroll*, p. 8 n.

³ *Principles*, ii. p. 461.

⁴ *Ibid.* ii. p. 459.

⁵ *Ibid.* ii. p. 182.

defence but the defence of one's fellow-creatures,¹ and he expressly recognizes aggression as a natural right. "Where conquest is matter of right," he says, "it amounts to no more than a just possession obtained by force."² Regarding jurisprudence as a science of the relation between rights and duties, he elects to consider it mainly from the point of view of the subjective side of the relation; but he does not fail to make it clear that in their totality the interests of the subject coincide with those of the object: so that, if he is inclined to lay down a line of demarcation between subjective and objective rights and duties, he does so only as the surveyor lays down lines of longitude and latitude upon his map; not because any such lines exist by nature in the country which he surveys, but in order that he may be the safer not to lose his way, and that he may be the more surely guided from the known to the unknown districts of an unexplored region. The same may be said of any line which he draws between jurisprudence and ethics. Though he verbally admits the distinction between perfect and imperfect obligations, he is careful to qualify it thus: "The use of words is no doubt in some measure arbitrary, but it ought not to be implied in any words that we employ that a rule, merely because it may be enforced, is in any degree more binding than the consideration of what is in itself an article of wisdom as constituent of good to mankind. Justice, therefore, though properly said to be the object of compulsory law, is no less above the reach of compulsion than beneficence."³ In his catalogue of the virtues he makes Beneficence and Charity offices of Goodness or Justice,⁴ thus identifying jurisprudence and ethics in their ultimate object. The general character of Ferguson's contribution to scientific jurisprudence cannot be better described than in the words of Cousin:—"On retrouve dans sa methode la sagesse et la circonspection de l'école écossaise, avec quelque chose de plus male et de plus décisif dans les résultats."⁵

Though the Scottish philosophy has produced many thinkers since the time of Ferguson, none of these have, unfortunately, devoted so much of their attention to jurisprudence as to make themselves of any further value to the student than as adherents to the general doctrine of Scottish jurists, as investigators of isolated points in the science of law, or as moralists who have rendered clearer the ethical principles upon which all jurisprudence is based. James Beattie (1735-1803) gave in his *Elements of Moral Philosophy* a discussion of the General Nature of Law and of the Origin and Nature of Civil Government, but he has added little, if anything, to the results attained by his predecessors, save a long exposition of the injustice of Slavery. Dugald Stewart (1753-1828), a pupil of Ferguson, has done much to spread the Scottish philosophy, and his successor in the Chair of Moral Philosophy in the

¹ *Principles*, ii. p. 219.

² *Ibid.* ii. p. 316.

⁴ *Ibid.* ii. p. 330.

³ *Ibid.* ii. p. 201.

⁵ *Philosophie Ecossaise*, p. 512.

University of Edinburgh, Dr. Thomas Brown (1778-1820), freed scientific jurisprudence of the false doctrine of the distinction between perfect and imperfect obligations. It has been seen that the distinction was never adopted without some qualification in Scotland; but the want of any final exposure of the fallacy upon which it rests introduced confusion of the relative spheres of jurisprudence and ethics and of the relation in which Charity stands to Justice into the teaching of almost every member of the Scottish School. While the first principles which furnish its refutation were early recognized and continued to be stated with growing clearness, its rejection was only gradual; and even Brown's refutation of it, standing as it did as part of a hastily-prepared course of lectures on Moral Philosophy, required a fuller expansion. This it has now received,¹ and, if the errors to which its exposition has led could be eradicated once for all by a complete refutation of the unscientific ground on which they rest, we should hear no more, in philosophic discourse at least, of mercy being necessary to season justice, of justice being postponed to generosity, or of such principles as that "*sum cuique tribuere*" is good enough for a moralist, while something better must be provided for a scientific jurist.

This account of the contributions of the more prominent members of the Scottish School of Jurisprudence to the body of their science would be more complete, and the operation of the specializing tendency which constrained moral philosophers in Scotland to restrict their speculations more and more as time went on to the ultra-jural sphere alone of ethics, would be more fully illustrated if a sketch could be given of the work of those who have occupied the Chair of Natural Law in the University of Edinburgh. But, until we come to recent times, adequate material for such a sketch seems unfortunately not to exist. Records of the public life of the professors of the past are preserved, and will doubtless be embodied in Sir Alexander Grant's forthcoming *History of the University*; but only one of these professors has left any work behind him. Even this cannot be considered an original contribution to the science of law. Yet, from the notes and illustrations to a Compendium of Grotius' Treatise *De Jure Belli ac Pacis*, which was published by William Scott in 1707 as a text-book for his class, we can gather that Scots students were still kept familiar with the doctrines of natural law which prevailed on the Continent; while the history of Scott's academical career warrants the inference that some preliminary experience in the teaching of moral philosophy was considered, if not an essential, yet a commendable qualification in a Professor of Natural Law. As Stair had been in Glasgow, so had Scott been in Edinburgh, a regent of the University (1708); and he held the Chair of Moral Philosophy from 1729 to 1734. This inference is strengthened by the case of two of his successors, Charles Areskine, the first occupant of the Chair of Natural Law,

¹ Lorimer's *Institutes of Law*, Book i. chap. xi.

and James Balfour, Esq., of Pilrig (1703–1795), who was appointed Professor of Moral Philosophy in 1754, and, leaving this chair ten years later to his more distinguished successor, Ferguson, was transferred to that of Natural Law. The two small works which he has left, *A Delineation of the Nature and Obligation of Morality*, and a small volume of *Philosophical Dissertations*, are interesting, as showing that he was in full sympathy with the Scottish School, and that he maintained, in opposition to the prevalent hypothesis of a moral sense or sentiment, that the mental means by which natural law is revealed to men is no separate faculty, but their whole nature. In the former work he controverts Hume's position that justice originates in a sense of public utility. "Mere utility," he says,¹ "cannot be the ground of legal obligation, for that was the same before as after the law or sanction." In the latter work he repudiates Adam Smith's doctrine of a moral sentiment, and says:—"The power necessary to produce an effect so great and so illustrious cannot arise from simple affection; it must require the regular and united influence of every principle that can communicate vigour to the mind. As its object is public, extensive, and complicated, relating to the general happiness of mankind, we must therefore find it in a wise and regular system of nature, or we shall find it nowhere."² Both of the works contain references to Montesquieu,—whose influence on the study of jurisprudence in Scotland is likewise to be traced in the writings of Ferguson,—but neither of them deal sufficiently with legal doctrine to enable us to rank them as permanent contributions to Scottish Jurisprudence.

Such a contribution, however, has been made by the present Professor of Natural Law. Professor Lorimer's *Institutes of Law* establishes a system of jurisprudence upon the basis of conformity with the law of nature, and his *Institutes of the Law of Nations* applies to positive human relations the speculative and scientific principles which the former work expounds. Those who are familiar with these works will have already recognized that the writer of this paper is a pupil of their author. "Doctrine," says Lord Bacon (*Advancement of Learning*, Book II.), "should be such as should make men in love with the lesson and not with the teacher, being directed to the auditor's benefit and not to the author's commendation." Yet it is hard indeed for one who has come under the influence of Professor Lorimer's personal teaching to be less enthusiastic than critical in an account of his work. Sceptical readers are, however, referred to the works themselves.

Professor Lorimer's Continental training, and his position as member of the Institute of International Law and Foreign Academies of Jurisprudence, have rendered him specially fitted to maintain that intellectual connection with the main current of European thought which has been noted as a characteristic of the

¹ P. 67.

² P. 111.

Scottish School. The keen precision of logical method, and the clear brilliancy of style with which he develops his doctrine, make his work resemble that of a French *savant*; but the solidity of the matter thus expounded, and the breadth of erudition revealed in illustration and reference, are qualities which Scotsmen will not readily admit to be derived from any other than a native source. The divine origin of natural law, and the declaratory nature of positive law, the identity in the principles of justice and charity, and in the objects of jurisprudence and ethics, the autonomy of human nature, and the reciprocity of rights and duties, are the principles which he establishes and weaves into a self-centred system which, though by its subject complex, is in its treatment clear. Of no less value to scientific jurisprudence are his refutations of false doctrines—that of the absolute equality of men, and notably that of the distinction between perfect and imperfect obligations. Thus the present representative of the Scottish School preserves its best traditions, and, with the freshness of a new mind, develops them into harmony with the fuller knowledge which time has brought to this nineteenth century. He is as brilliant as Ferguson, and as sound as Stair.

It will appear from this brief notice of the general doctrines of the Scottish School of Jurisprudence that it seeks to gain acceptance and establish its validity rather by a close adherence to the fundamental and permanent beliefs of humanity than by any factitious charm of originality. Like all true philosophy, it rates the slow security of conviction higher than the sudden faith of enthusiasm. It lays no claim to the character of an enlightenment (*Aufklärung*) of what before was obscure, striving rather to make knowledge grow apace with the widening experience of the world, to expound a truth which is already true. It is perhaps one of the strangest facts in human nature that truth should need exposition; yet it is the case that men and philosophers in their search for truth are apt, Narcissus-like, not to see further down the well than where the superficial image lies, and to maintain their resemblance to the Arcadian shepherd by finding a snug satisfaction in the contemplation of what is after all only a reflex of their own peculiar view. Still, as all philosophy, mental, moral, and legal, must start from the facts of human nature, it is only according to the measure of their agreement with the facts of human nature that systems of psychology, ethics, and jurisprudence can claim acceptance. They are veritable only in so far as they are correct images of the object from which they are reflected. As Kant puts it, "Humanity as objective end ought to form, as law, the supreme limiting condition of all subjective ends."¹ In the realization of the human idea, the heavenly half of man, "half dust, half deity,"² law in the Scottish

¹ Quoted in Mr. Andrew Seth's *Development from Kant to Hegel*, p. 101.

² Lord Byron, *Manfred*, p. i. 2.

School finds the scent which is to guide it on the hunt: in humanity as a condition, in the earthly half of man in whom

“Clay and clay differs in dignity
Whose dust is both alike,”¹

it finds the limitation which makes it a science of means and of adjustment. It seeks as a means the realization of liberty and order, not through the absolute freedom of the individual, which was the method of the old Greek Republic, nor through that “*schroffe Herrschaft über Individuen*,”² which was the policy of old Rome; but by recognizing that human rights, duties, and interests, like gases, by their nature interfuse and commingle, and as a science of adjustment finding the true formula for the compound—declaring in positive law the true relation of its objects. The Scottish School declines to be convinced by the *argumentum baculinum* or club logic, which finds the essence of law in its bare might or sovereign authority; only where might is right because it is right does the Scottish School recognize the existence of the best form of government—Cosmocracy. “A constitution,” says a typical Scot,³ “will march when it exhibits, if not the old habits and beliefs of the constituted, then accurately their rights, or better indeed their mights—for these two, well understood, are they not one and the same?” These doctrines are not new, but they have something of the freshness of the evergreen. They have grown century by century from the seed set by “that wonderful old Greek who was Alexander the Great’s and the old world’s school-master, and ours, if we were wise.”⁴

Jurisprudence in England has taken another course. Quitting the broad stream of science which flowed steadily through the systems of the philosophic jurists of the Continent, it has divagated through the theories of Hobbes, Bentham, Mill, and Austin into a marshy ground of empiricism which affords no sure foothold—no *πρὸς ὅτι* whereon law can rest its authority. It has seen fit to dismiss from its consideration the ethical foundation without which any kind of authority, be it constituted by ever so careful a means—social contract, sovereign will, or plebiscite—loses its self-centre, and gains only the frail supremacy of a *potentia non sua vinixa*. There can be little doubt that this is largely due to the acceptance which Englishmen have given to a Utilitarian philosophy. Their “dogmatic slumber” has been undisturbed by the daybreak in which Kant awoke to find, *inter alia*, that the authority of law springs from the fact that it enjoins the realization of what we recognize as our permanent and essential self. Yet neither the frequency nor the closeness of the adherence to a philosophy makes it true; for Truth is above Belief. The sun was at rest, self-centred, before Copernicus published his *De Revolutionibus*

¹ Shakespeare, *Cymbeline*, ii. p. 2.

² Hegel, *Philosophy of History*.

³ Carlyle, *French Revolution*, popular ed. ii. pp. 177–8.

⁴ Dr. John Brown, *Horæ Subsecivæ*, ii. p. 331.

Orbium; the earth spun round, sun-centred, long before Galileo whispered: "And yet it moves." However unanimous therefore, and however numerous may be the professed English teachers of the doctrine that a sovereign's command is a sufficient basis for a science of law, or that social utility and the greatest happiness of the greatest number form an adequate test of the propriety of a jural relation, a student will be justified in assuming a sceptical attitude towards them until they can adduce, and in fortifying his doubt into denial if they do not adduce, matter logical or rational which will serve to crystallize his perplexities into that fuller knowledge which follows on honest scepticism of a true philosophy.

This theory of an absolute sovereign authority is not, as it might be supposed to be, a mere reiteration of something which is said now because it was said before in the times of the Tudors and the Stuarts. It is the doctrine upon which the prevailing conceptions of scientific jurisprudence in the English sense are based. The most recent work of any importance on this subject is Mr. Herbert Spencer's *Political Institutions*; and the author, whose philosophy is deeper than that of most English jurists, protests against the currency of the error which the theory involves. "Even now," he says, "there is no clear apprehension of the fact that governments are not themselves powerful, but are the instrumentalities of a power." And, indeed, one has only to turn to any of the "text-books recommended" in order to find that the clear apprehension of English jurists has not yet brought the fact within their range of vision. Austin's is the standard work, and he is the best representative of English views. Though he professedly endeavours to show that jurisprudence is totally independent of ethics and theology, the fact that he devotes a very considerable number of his lectures to explaining away some supposed relationship between these sciences, suggests the reflection that he was afraid lest to an ordinary mind their kinship would appear by no means so distant as he would make it out to be. Nor is this reflection dismissed when it appears that in order to make good his thesis he is fain to give to ethical and theological conceptions a signification as widely alien to that which moralists and theologians ascribe to them as is his own determined sphere of jurisprudence from his sphere of ethics. He has to criticise Blackstone¹ for maintaining that no human law should be suffered to contradict the law of God, and finds the "index of the law of God" to be the principle of utility. He argues further, that the general happiness of mankind is the test of the law of God.² By Ethics he understands morals which tend to produce human happiness;³ and by positive morality, morals as they are, that is (according to him), as they are declared to be by general opinion.⁴ This triple test of utility,

¹ *Lectures on Jurisprudence, or the Philosophy of Positive Law*, by the late John Austin, 4th ed., London 1873, i. p. 220.

² *Ibid.* i. p. 109.

³ *Ibid.* i. p. 177 sq.

⁴ *Ibid.* i. p. 187.

greatest happiness and general opinion, lacks that finality which is the essential quality of a scientific principle. Even if Austin had succeeded in what he does not attempt, the determination of the object *for* which laws are useful, he would still be met by the difficulty that what is useful now may have been useless in the past, and may become useless in the changed circumstances which the future will bring: so that, if utility is the index of the laws of God, it can only be said to be an index at the end of the book, meaningless in itself, and referring any one who would know its meaning back to the text itself. Happiness, too, even of the highest sort, is only the concomitant of action in accordance with law, not the end by which that action is to be determined; and as for opinion, the remarks of Shakespeare's Thersites is in point: "A plague of opinion! A man may wear it on both sides, like a leather jerkin."¹

When Austin has determined his sphere, and expounds doctrines of law apart from their relation to ethics and theology, a studied nomenclature and skilful draughtsmanship gives his work the sanction of a statutory air. But authority does not lie in the letter of the law: so by its reason must the truth of his theory be tested. According to him, law is the command of a superior to an inferior enjoining a certain course of action, which will be enforced by punishment.² But what if the course of action enjoined be unjust? What if the punishment set at naught the inferior's old-established rights and liberties? One naturally expects to find in Austin's explanation of justice, right, and liberty that these questions will receive an answer which, logically at least, will support his first principles. But what does he say? Justice is the observance of laws good or bad, and no law can be unjust.³ Rights are powers conferred by law,⁴ and declaratory laws ought to be classed with laws figurative.⁵ Liberty, freedom, are negative names, denoting the absence of restraint,⁶ and civil liberty is the liberty from legal obligation.⁷ This definition by cross-reference has certainly a logical character, that of running round a vicious circle to reach retrograde conclusions; but it cannot be said to contain more than a technical expansion of the proverbial platitude, "Law is Law."

Material for science, however, may be found in the historical and analytical writers of the English School. The analytical process, by which a system of so-called natural laws is evolved from the decomposition and comparison of the positive institutions of marriage, contract, and the like, is open to the same objections as have been urged above to Lord Kames' *Principles of Equity*; and further, to the graver objection that the analysis is made without any scientific conception of the object to be attained. Analysis is serviceable only as a method, results are not otherwise

¹ *Troilus and Cressida*, iii. p. 3.

² *Lectures*, i. pp. 189-90.

³ *Ibid.* i. p. 219.

⁴ *Ibid.* i. p. 276, and note.

⁵ *Ibid.* i. p. 366.

⁶ *Ibid.* i. p. 102.

⁷ *Ibid.* i. p. 281.

to be attained than by a synthesis which will bring the antithesis which analysis reveals into harmony with a preconceived ideal. Analysis is thus to be compared rather to an anatomy of the *dissecta membra* of English law than to a science of Medicine which seeks the realization of health in its objects. The same objection applies to the historical method, though in a far less degree; for a careful study of the history of any institution will generally reveal its errors if it is based on falsehood, or show the ideal towards which it is working if it is based on truth. Yet more than mere history is necessary for this purpose. An Edinburgh Reviewer¹ of Sir Henry S. Maine ingeniously points out that his method would resemble a defence or prosecution which relied solely on a narration of the facts of the case, and took no care to establish their legality or criminality.

There are practical consequences of the conceptions of scientific jurisprudence which prevail in Scotland and in England. These give some idea of the value of the respective teaching of the two schools which have been here passed in review. A Scotch advocate relies mainly on principle, and can appeal to the civil law when the municipal law of his own country contains no rule applicable to the point at issue. The English barrister must base his argument on precedent, and the rejection of Roman law by English Courts and jurists has isolated England from the field occupied by Scotland in common with the states of modern Europe which have developed their private law from the law of Rome. The blind faith in precedent, which in systems of natural law necessitated the untenable hypothesis of a social contract, has been at the bottom of many abuses which are now matter of political history. Charles I.'s tax of ship-money, which proceeded on "new writs of an old edition," may be taken as a notorious example. When English historians have to recount some glaring piece of injustice done in virtue of the "sovereign authority" of law, they usually console themselves with the reflection that the kings who most tyrannously abused the liberties of their subjects always maintained at least a show of legality in the execution of wrong. This casuistry has served only to recommend an unquestioning belief in the letter of the law, and to elaborate that pedantic formalism which English jurists themselves protest against as the plague of their law. The English sanctity of precedent seeks to give to fossil laws all the force of life. An Act, no matter how old, how long forgotten, how unsuited to the changed condition of the relation to which it is applicable, has still the force of law until it has been repealed. Thus, as Mr. Pollock tells us,² the private blood-feud formally and finally disappeared from English jurisprudence only in the present century. In Scotland, on the other hand, a statute may lose its force by falling into desuetude: law follows fact. The necessity

¹ *Ed. Rev.* vol. cxiv. October 1861.

² In his paper on *The History of English Law as a Branch of Politics*.

for some more permanent and universal authority than that of a sovereign command led in England to the working out of a system misnamed Equity; but the unscientific jurisprudence which compiled and extended its rules created a Frankenstein's monster, which threatened to exterminate its artificer, and there is now no longer equity in England. English jurists speak of the "fusion" of law and equity as a thing to be accomplished in the future, and Sir H. Maine, in his recent work on the *Early History of Constitutions*, credits Bentham with originality for suggesting it; but this "fusion" exists already in Nature, and has been recognized in Scotland from the first. The *nobile officium* of the Supreme Court in Scotland supplies the place of any such positive system, and the maxim, "*Noblesse oblige*," which corresponds to the scientific principle that power is the measure of responsibility, may thus be said—if by exaggeration, then by exaggeration of the truth—to be a brocard of our law. Scots law, again, has been regarded as eminently susceptible of codification. Bell's *Principles* reads like a code, and might serve as a model for such a work. It would be open only to the objections which apply to all codifications, not to any based upon the character of the law which it was sought to codify. But who would attempt to reconcile the antinomies of English law into system? The most obvious characteristic of that law is its heterogeneousness, its detail and discrepancy. In this respect *non caret vate sacro*. The Laureate sings of

"The lawless science of our law,
That codeless myriad of precedent,
That wilderness of single instances,
Through which a few, by wit or fortune led,
May beat a pathway out to wealth and fame."¹

The Scots student, therefore, who thus becomes aware of the position which his country has taken in developing Law into a science, may be excused if he feels a hereditary thrill of the old national pride. When he reflects that history has recorded no error in the policy of nations which might not have been avoided or much mitigated by a clearer preconception of the objects which men, as men, citizens, and patriots, are by their nature bound to attain, or by a fuller recognition of the limitations which determine the means of human progress; and when he sees that scientific jurisprudence as it is taught to him is an honest attempt to discover and declare these objects, and to think out these means in accordance with the imperishable nature of mankind, which alone is capable of progress,—he may hope, amid his not wholly unfounded fears of the possible recurrence of political and legal difficulties in the future, that their solution will be aided by the principles which have come down from Scottish jurists of the past, to be continued and expanded at the present day into an inheritance gladly and gratefully accepted by the generation which he represents.

GEO. P. M'NEILL

¹ Aylmer's Field, l. 435 *et seq.*

DECISIONS UNDER THE EMPLOYERS' LIABILITY ACT.

CONSIDERING the number of cases which must have occurred under the Employers' Liability Act, not a very large number have as yet come before the Supreme Courts. One obvious reason of this is that actions under the Act must in the first instance be brought in England in the County Court, and in Scotland in what the Act calls the "Sheriff's Court," following the precedent of the Bill brought in after the Porteous Mob affair, which spoke of the "bailiffs" of Edinburgh.¹ Consequently, as a rule, it is only when some point of nicety or importance is involved that a case makes its appearance in the superior tribunal. Those which do are therefore all the more worthy of attention. Cases which turn upon the construction of the Act are specially deserving of note. The Act is eminently one of the class which requires, which may almost be said to invite, and at any rate might have been expected to receive, and which does receive, judicial construction. Without knowing the cases under the Act, one cannot be said to know the Act. There are some expressions employed, such as "ordinarily engaged," "reasonable time," which perhaps it was necessary to leave vague and indefinite, but some idea of what is to be regarded as "reasonable time," etc., can be got from seeing how the words have been applied to the circumstances of cases actually occurring, and it can be got in no other way. But what is more important is this: the circumstances in which an accident occurs, we mean the circumstances as regards liability, admit of such a variety of combinations that it is scarcely possible so to graduate the expression of the provisions as to carry out to its full extent, and to no further than its full extent, the dominant and informing idea of the measure, and to make it clear, whenever a case turns up, whether it falls within the category of liability or not. We may avoid the difficulty, and content ourselves with laying down broad and general rules, but by so doing we in reality leave the application of the principle in the hands of the judge. If, however, we do attempt to provide for every possible case, then we are obliged to have recourse to divisions and subdivisions, limitations and qualifications, exceptions upon exceptions, and definitions perhaps adding to, perhaps subtracting from, the rules first laid down, so that the Act becomes "with cycle and epicycle scribbled o'er." The consequence is, that even on a speculative perusal of the Act, without reference to any particular case, one gets bewildered. One feels as when, inquiring the nearest road to a place, he is told to go straight along the road, then turn to the left, afterwards take the first turning to the right, and then on coming to three cross roads, etc. etc. Sometimes after

¹ The slip of the English draftsman was corrected in the earlier Bill, in time to prevent it disfiguring the Act. The Lord Advocate of the time was Duncan Forbes of Culloden.

perusing the Employers' Liability Act the reader feels that he has come to three cross roads. Further, the circumstances as to responsibility not only admit of such a variety of combinations, but they have a trick of combining themselves in such unexpected ways as to baffle the efforts of the most vigilant and the most ingenious foresight. A case occurs which obstinately refuses to range itself in any of the categories which have been obligingly prepared for its reception, which squats itself on the border-line between the rule and the exception, or which shows that an expression which its author imagined to be unimpeachable in point of clearness and preciseness, is really ambiguous, and embraces not one, but two cases, one of which is, and the other of which is not, within the guiding spirit of the Act. In such cases the complex qualifications that have been provided, so far from lending assistance, give cause to embarrassment. If simply the leading rule had been stated, one might reason out the proper application of it when the case occurred. But the more minute the provisions of the Act are, the more difficult they are of proper application, in view of the original principle, when these unexpected cases occur.

We proceed to note the more interesting of the cases decided under the Act.

The first of the five cases in which liability is imposed upon employers for personal injuries to workmen, is where the injury is caused "by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer" (section 1, sub-section 1). This is qualified by sub-section 1 of section 2, which provides that the employer is not liable "unless the defect arose from or had not been discovered or remedied, owing to the negligence of the employer, or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, etc., were in proper condition."

In *Moore v. Shaw*, March 13, 1883, it was laid down by the Queen's Bench Division that the *defect*, say in the plant, must be a defect in the purpose for which it was intended. In this case a workman was on the staging of a scaffolding supported by "putlogs." The staging being in the course of removal, one of the putlogs had got exposed, and had become loose. The workman, crossing the staging, stepped on to this putlog; it gave way, he was thrown down, and was killed. The County Court judge put it to the jury whether, having regard to the purpose for which it was used, it was negligence to leave the putlog untied, and the jury found it was. The Queen's Bench Division held this a misdirection. Baron Pollock said, according to the *Times'* report: "The point had been taken at the trial, that the deceased knew perfectly well that the putlogs were not meant to be stepped upon, but were intended as supports for the staging. The jury therefore ought to have been

asked whether the deceased when he stepped upon the putlog was using it in a reasonable and proper manner; for it was one thing to use a putlog for the purpose for which it was intended, and another thing to use it as the deceased had done; and he was prepared to hold that the 'defect,' to be within the Act, must be a defect having regard to the purpose for which the plant was intended." There can be no objection to this; but it does not seem to be of much consequence whether there was or was not a defect having regard to the purpose for which the plant was intended, if it was used for a purpose for which it was not intended.

By the terms of the Act, the defect need not be in "the ways," etc., itself, it is enough that it is in the "condition" of the ways, etc. These words, "condition of," it may be remarked, were inserted in the clause after it reached the House of Lords. In *M'Giffin v. Palmer*, L. R. 10, Q. B. Div. 5, a "defect in the condition of the way" was the cause of injury alleged. There was a roadway or iron plates in defender's iron rolling mills, along which iron still at white heat, in portions called balls, was conveyed by puddlers in hand-waggon or bogies from the furnace to a steam hammer. At the side of this roadway was a heap of a substance called "tap," used by puddlers for lining the furnace. A labourer, not entrusted with superintendence, had negligently placed a piece of tap on this roadway. A puddler was running his loaded bogie along this race or roadway, when one of the wheels caught on the projecting piece of tap; this sharply checked the pace of the waggon, the man fell, the ball rolled off the waggon on to the man, inflicting injuries that resulted in his death. The projecting tap might easily have been removed by one person in a few seconds if it was found to be an obstruction. The Court held that there was an obstruction to the way, not a defect in the condition of the way. As to the meaning of the term "way," Mr. Justice Field thought it necessary to say: "It seems to me that the Legislature in using the word 'way' means not a right of way, not the right to walk up and down on this race, but it means a thing—something which is the property of the employer, which it is his duty to find and use, or which he does in any way use in the business. Here the word 'way' means a material thing." We hardly know what a defect in the condition of a right of way could be, except that you had not got it. One must look to the context to discover the meaning of the word "way." There are many ways in which the word "way" may be used. For example, there are Wisdom's ways; but as "her ways are ways of pleasantness, and all her paths are peace," her ways are not the ways used in collieries and ironworks. There is "pretty Fanny's way," and there is "the way of the world," and "the way of all flesh," but these are not the "ways" referred to in section 1, sub-section 1, of the Act 43 and 44 Vict. c. 42. In the case of *Moore v. Shaw*, the judges did not think it necessary to explain that "plant" did not mean the plant you

of the new right thus conferred upon workmen, by providing that the expression "a person who has superintendence entrusted to him," shall mean, "a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour." A person who is ordinarily engaged in manual labour may and often is a person who is ordinarily engaged in superintendence ; so that the limitation thus made, so far as concerns the cases to which it extends, goes against the ruling principle of the Act, viz. that the employer should be liable for the acts of superintendence of those to whom he has delegated his duty, just as he is for his own. No doubt this limitation was intended to draw in a rough and ready fashion a broad line of distinction between persons who were to be regarded as only common workmen, and those who were to be regarded as delegated with the employer's authority. In the case of *Shaffers v. General Steam Navigation Co.*, L. R. 11, Q. B. Div. 356, liability was sought to be imposed on the employer under this sub-section, and the limitation introduced by the latter part of the definition clause was a ground, and the main ground, for holding the employer free from liability. Sacks of corn were being loaded from a barge into a steamer by means of a crane. A "gangway man" gave directions when to lower and hoist. It was also his duty to guide the beam of the crane by means of a guy rope. When some sacks were being hoisted he neglected to use the guy rope, the beam swung round, the sacks struck the combing, slipped out of the sling, fell down the hatchway, and injured the plaintiff working in the hold. The employer was held free. "The only question," said Mr. Justice Manisty, "is whether the gangway man was a person having superintendence as defined in the 8th section of the Act. . . . I am clearly of opinion that he was not a person whose sole or principal duty was that of superintendence." Not only so, but he was ordinarily engaged in manual labour. The guidance of the guy rope was manual labour. No doubt it was in a sense a duty of direction, but direction of the machinery is not superintendence, and even if it was it was manual direction. There was another ground for holding the employer not liable. The negligent act was not in giving directions to lower or hoist the crane, which was superintendence, but in the guiding the guy rope, which was manual labour.

In the case of *Osborn v. Jackson*, 48 L. T. Rep. 642, the question was whether the act of negligence which caused the accident was "in the exercise of superintendence ;" and it shows the necessity of minute attention to the circumstances of a case, and how very slight a variation of circumstances might turn the scale in favour of or against liability. The circumstances of the case, at least the circumstances in the view of the case which the Court took, and on which they proceeded, were these. In a building which was being

taken down, a foreman, whose general duty was that of superintendence, and whose duty did not require him to do any act of manual labour, was engaged in passing a plank some 12 feet long from one gallery to another. He called to a workman in the other gallery to lay hold of the other end of the plank. The workman was too far off to take a proper grasp of it. While the workman had not yet a firm grasp of the plank, the foreman let his end go, the plank consequently slipped, and fell on and injured a workman on the flat below. It was argued that the foreman was not acting as superintendent, that he was doing something which was no part of his duty as superintendent, but what any ordinary workman might have done. The Court held that the negligence of the foreman occurred in the exercise of superintendence, and therefore the employer was liable. The circumstance that the foreman was doing something more than superintending, was taking part in the work of laying the plank, was of course held to be in itself of no importance. "The foreman was not the less guilty of negligence in the exercise of superintendence," said Mr. Justice Denman, "because, at the time, he was doing some work as a volunteer which he need not strictly have done. I can find no case which says that because he was supplying the place of another workman, his act was not less an act done while exercising a general superintendence over the work. . . . He was superintending the work, and at the same time supplying the place of a workman; and I think that the negligence occurred in the course of his duty as superintendent." It seems to us that there were two acts of negligence on the part of this foreman. He did wrong in calling to a workman who was too far off to take a proper hold of the plank, and he did wrong in letting go of his own end of the plank before he saw that it was properly seized hold of by the workman. But the original cause, the negligence without which the accident would not have happened, was the improper direction to the workman. It seems to us that if there had been no other negligence of the foreman than that of his letting go of his end of the plank too soon, that being merely an act of manual labour and not negligence in the exercise of superintendence, the employer would not have been liable. The negligence would not in that case have been connected with the superintendence. The question remains, was the direction to the workman to take hold of the plank an act of superintendence? It may be said that it was not necessarily so, that as two people are required to lay a plank over a gap a number of feet apart, an ordinary workman would have done the same thing, would have called upon his mate to bear a hand. Undoubtedly the calling to the workman may be attributed to either character of the foreman, that of a superintendent, or that of, for the time being, an ordinary workman. But, being a superintendent, and being at the time engaged in a general superintendence, which

involves a particular superintendence over the operation in which he was actually engaged, the request could not fail to be regarded as done in the character of a superintendent. The negligent character of a direction does not determine whether an act of an ambiguous nature, and which may be attributed either to the character of a superintendent or the character of a workman, is to be referred to one or the other. But it determines the character in which the request was regarded as given. The workman obeyed the direction, although he knew that he was too far off to do what was required satisfactorily. He would not have done so if it had been an ordinary workman who had given such a misdirection. If a direction given may be attributed to either character, it is natural and it is right, in a question as to the consequent liability, to attribute it to that character in which, because of the general actings of the foreman, it was supposed to have been given, and being so supposed to have been given, it was obeyed and became the cause of the accident. Further, the foreman was charged with a general superintendence to see, as he expressed it, that the men did not hurt one another. Now, if he allowed a wrong request or direction to be made, whether by another or by himself acting as a common workman, he was guilty of a failure in this duty of superintendence.

The ratio of the case is that the negligence was in the exercise of superintendence, and the negligence was in giving a misdirection, and this it seems to us is the ground on which the judgment proceeded. In the passage quoted, Mr. Justice Denman plainly states that the negligence was in the exercise of superintendence, and Mr. Justice Hawkins as plainly indicates in what the negligence consisted: "I think that the foreman was guilty of negligence; because if his duty was to superintend the removal of the plank, and to see that it was passed over in safety, so as to occasion no harm, and if that being his duty he called the workman to take the plank into his care at a time when the workman was unable to grasp it, that amounted to a direction to the workman to take the plank; and the learned judge of the County Court has held that in giving that direction he was negligent." And during the argument the same learned judge observed: "The foreman directed the workman to hold a board he had not a firm grasp of. Is not that forcing on the workman the performance of a duty which proper care would not have entrusted to him?"

There is an ambiguity of expression in the provision imposing liability for the acts of a person entrusted with superintendence. Liability is imposed for "the negligence of any person in the service of the employer who has any superintendence entrusted to him *whilst* in the exercise of such superintendence." What is the precise import of the last words: "*whilst* in the exercise of such

superintendence" ? Do they refer to the time at which, or to the capacity in which, the negligence occurs ? Suppose the superintendent, at the time he is superintending, also chooses to engage in some other work than that of superintendence, takes part in some manual work as an ordinary workman might do, and does some negligent act in the manual labour part of his work, is the employer responsible ? Clearly not, we think. Suppose there had been a slight alteration of circumstances in the case of *Osborn v. Jackson*, and the foreman had, not given a misdirection but, let his end of the plank fall too soon. This negligent act would not have been an act of superintendence, it would have been an act of manual labour, and acts of manual labour do not involve the employer in liability, while acts of superintendence do. To hold that the employer would be liable in such a case would be to hold that when the two functions of superintending and taking part in the work happen to be conjoined for the time being, they are to be regarded as so mixed up that negligence in the one is to entail the same responsibility as negligence in the other. The two functions may happen to be combined, but they are logically severable, and seeing that a responsibility attaching to the one does not attach to the other, they must be dissevered in determining what responsibility has been incurred. We think this is clear enough when we keep in view what was the main scope and purpose of the Act. Prior to the Act the doctrine of *collaborateur* had been carried so far that an employer was held not liable for the negligence even of a person whom he had entrusted with superintendence. This being thought unjust, the Employers' Liability Act was passed to alter the law in this respect, but not to alter it so far as to make the employer liable to a workman for the act of a fellow-workman. It was the exercise of the power of superintendence that was to be the connecting link between the negligence of the person in the employer's service and the responsibility of the employer. That is the *rationale*. But if you make the employer liable merely because the person who commits the negligent act is at the time superintending, although the negligent act is not an act of superintendence, you are going far beyond the principle of the statute, and are introducing a principle which was never intended to be the basis of liability, viz. the principle that an employer should be liable to a workman for the fault of his fellow-servant. It is easy to see how the difficulty about the construction of this clause of the statute has arisen. As the provision originally stood in the Bill, the employer was to be liable for the negligence of a person entrusted with superintendence. This obviously meant negligence in superintending. But some members, Mr. Norwood, member for Hull, for example, wished to make this more clear, and so the clause was subjected to the usual process of alteration, in the

course of which the little word "whilst" crept in, with the result of making the meaning doubtful. The case of *Shaffers*, above noted, bears out the view we have stated as to the import of the words. The gangway man was charged with the duty of giving orders to lower and hoist, which was a duty of superintendence, and also with the guidance of the guy rope, which was a duty of manual labour, and the negligent act was in the course of the latter employment. In addition to the ground for holding the employer not liable, that the gangway man was not a superintendent in the sense of the Act, this other ground was stated, that "the accident arose from his," the gangway man's, "negligence in the capacity of a workman, not in the capacity of a superintendent." In *Osborn v. Jackson*, Mr. Justice Denman, referring to this case, said: "There were, in fact, two distinct duties to be performed by the person whose negligence was in question, his duty as a workman and his duty as a superintendent, and it was in respect of his duty as a workman, and not in respect of his duty of superintendence, that the negligence arose." The view we have taken is that taken in Mr. Campbell's edition of *Fraser on Master and Servant* (p. 229). "The word 'whilst' may be taken as referring either to the *time* when the negligence must be committed, or to the character of the negligence. The better interpretation is, that in order to charge the employer, the superintendent must have acted not merely as a negligent servant, but as a negligent superintendent. Accordingly the employer will be liable if a superintendent in a mine negligently allows the miners to smoke and an explosion ensues, but not if the superintendent himself is guilty of the offence." The illustration is not a happy one. Assuming, as we may assume, and as is here assumed, that smoking in a mine is an improper act, if a superintendent allows smoking in a mine he is a negligent superintendent, and it does not matter whether it is himself or other people who smoke. It is the duty of a superintendent in a mine to take precautions against accidents, and if he allows smoking he is neglecting a very necessary and obvious precaution, and so fails in his duty as superintendent.

(To be continued.)

THE NINTH COMMANDMENT.

Judge: "Now, sir, do you understand the nature of an oath?"

Witness: "Well, my Lord, I think I ought to, as I have been twice convicted of perjury."

The experience of this witness was certainly a singular one, for such a forcible reminder of the nature of an oath as even a single conviction of perjury is unfortunately rare in our day. We say *unfortunately*, for, though we would gladly conclude that the

rarity of such convictions results from the rarity of the offence, our experience points to a very different conclusion. No one, who spends much of his time in our courts of law, will be likely to form an exaggerated estimate of the value which witnesses in the present day attach to the oath. The Duke of Argyll, in discussing the Affirmation question in the House of Lords during last session of Parliament, is reported to have said,—

“No one, who has seen the oath administered in a Scottish court of justice, can ever forget the solemnity and impressiveness of the scene. The judge says to the witness—‘Hold up your hand, and repeat after me these words: I swear *to* (*sic*) Almighty God, as I shall answer to *Him* (*sic*) at the great day of judgment, that I shall speak the truth, the whole truth, and nothing but the truth.’”
—*House of Lords, 4th July 1882, Hansard, Sess. 1882, vol. vi. p. 1365.*

It may so strike a stranger of an impressionable sensibility, looking casually into a court of law, but it does not seem so to strike the witnesses who are brought there to give their evidence upon oath; indeed the “solemnity and impressiveness” of the scene seem generally to be quite forgotten as soon as the examiner in chief, fortified with a tissue of lies, politely called a pre-cognition, rises to begin the examination of the witness. We know of no sadder lesson in the dearth of human faith and honour than that which is learned by a sojourn for a few months in the precincts of any of our courts of justice. The novice is disposed to believe almost every witness who tells his story without manifest contradiction and inconsistency; but a short experience teaches him to discriminate the “impressions” made by the “demeanour” of the witnesses, the way in which they tell their story, and their conduct under cross-examination. By and by, however, he learns further that, after all, these are but fallible tests, that he must always suspend his judgment until he has heard the other side, and that even then he may find it impossible with perfect satisfaction to himself to determine which of two sets of conflicting witnesses have spoken the truth. The experience of a few proofs is enough to teach him that the most natural story, told in the most artless, straightforward, and consistent manner by the most innocent, anxious-looking girl—a story which, as heard by any one unfamiliar with our courts “to hear was to believe”—may be from beginning to end a tissue of deliberate falsehood and invention. There is, in fact, no better school of scepticism than a court of law; there, if nowhere else, one learns how true are the words of the seer, that “the heart of man is deceitful above all things, and desperately wicked.” One scriptural reference suggests another, which has again suggested the heading of this article, for it is perhaps worth remarking that we have it on the most venerable authority that perjury is no new crime—finding its place as it does as one of

the great breaches of divine and human law expressly forbidden in the Decalogue.

That perjury always has prevailed, and still prevails to an almost incredible extent amongst Oriental peoples, admits of no doubt; but it is not with perjury in Syria or even in India that we have here to do, but with perjury at home in our own courts, and that, if not a new thing, is certainly, we fear, greatly upon the increase. Reverence for the oath has in great measure died out, and even of superstitious dread of the oath hardly a trace survives. That such reverence and dread existed in the past admits of no doubt—witness the appeal to the ordeal, and the anxious provisions of our law for reference to the oath of parties. Now-a-days, however, the very classes which one would naturally expect to find still influenced by old superstitious dreads, show, if possible, less reverence for the oath than the better educated and more worldly-wise. If a man be wanted to swear to a false *alibi* in Glasgow Circuit Court, commend us to an Irish Roman Catholic; do we seek a witness who will tell one story to the pursuer, another to the defender, and a third to the Court? then let us find a Highland shepherd, who would not for worlds enter his house after dark otherwise than backwards. A venerable judge remarked the other day from the bench that there are two classes of cases from which perjury is never absent, viz. cases of affiliation and of horse-couping. The observation was perfectly just, but unfortunately perjury is by no means confined to cases of these classes. There is indeed no class of cases, from Police Court offences up to questions between powerful commercial companies, in which a judge can safely assume that the witnesses are honestly telling what they believe to be the truth. One would naturally expect that as the class who litigate in the Supreme Court are on the whole more respectable and more responsible than those who appeal to inferior tribunals, the Court of Session would be more free from this taint of corruption than the inferior courts. It may be so, but if so, sad indeed must be the state of these latter, for our experience in the Court of Session has satisfied us that in at least one out of every two proofs which are led in that court, perjury is committed.

It is a sorry sort of comfort to know that things are as bad or even worse in England. There, indeed, there exists a class fortunately still unknown in Scotland, who make a regular trade of securing suborned evidence. So far has this system been carried, that witnesses have not only been bribed to give distorted accounts of events which really happened, but some have actually been found to depone to the particulars of events, such as street accidents, which really never happened at all. Such was the nature of disclosures at a recent trial for subornation and perjury in London. It would appear from the evidence there led, that for

a very trifling sum of money any number of witnesses can without difficulty be found to swear to any event as having occurred at any place and at any time. A man who was present when the suborner engaged a number of his witnesses deponed, "I did not know at the time what the men were wanted for; but if I had known at the time that they were wanted to commit perjury, I should have done it. I did not think what they were wanted for, or whether what they said was true or false. If I had not been found out before, very likely I should have gone down to Guildford and committed perjury as the others did." It is impossible to imagine anything more barefaced than this statement. Even in Scotland, with all the decay of reverence for the oath, we have never had any such revelation of corruption as this. Matters would seem to be no better in Ireland. The Phoenix Park murderers had no difficulty in finding any number of witnesses who at the hour of the murder were in company with them at any place but in the Phoenix Park.

Now this decaying efficacy of the oath is no matter of mere historical or speculative interest. It is a matter of vital importance to the administration of justice in the land. Let faith in human credibility be destroyed, and the foundations of justice are poisoned at their very source, law becomes luck, and litigation a game of chance. Judgment must go out, not in his favour who has right on his side, but in his who has had the good fortune to employ as his agent the cleverest suborner. No man could conduct himself as a rational being who, apart from metaphysical subtleties, placed no practical reliance upon the testimony of his own senses; so no judge can administer law and justice who is unable to attach any credit to the testimony of witnesses.

There can be no doubt that the decline of superstition, unaccompanied as it has been by any corresponding progress in religion and morality, has had much to do with the decay of reverence for the oath. To the man of high moral principle or sincere religious conviction, his simple word is as binding upon his conscience as the most solemn oath; to a man destitute both of moral principle and of religious conviction, be his mind free from superstition, the most solemn oath has as little binding effect as the word which in ordinary life he daily and hourly breaks. The evil is not one which it is in the power of the jurist to eradicate. No solemnities in the administration of the oath, no severity in the execution of the law of perjury, will ever make habitual liars honest and truthful. Religious and moral advancement and enlightenment can alone uproot the evil. Until the whole *morale* of the masses is renewed and purified by the growth in their midst of a spirit of reverence and a sense of responsibility and duty, it is vain to expect that witnesses chosen at random from the masses will give upright and honest testimony in our courts of justice. But in the meantime

can nothing be done to check the evil? Is the law powerless to protect itself? Something, we think, can and ought to be done. The law cannot make men truthful any more than it can make them honest, but it can keep perjury in check just as it keeps down stealing. The law cannot frighten a man into a just appreciation of the moral significance of the distinction between *meum* and *tuum*, but it may inspire him with such a dread of the consequences of detection in the act of theft as will deter him from stealing his neighbour's purse. In like manner, although the law cannot frighten a man into a sense of the power and beauty of truth, it may prevent his giving deliberately false evidence in court, by holding before him the prospect of a conviction for perjury, followed by some months of detention in one of Her Majesty's prisons.

As we have already remarked, prosecutions for perjury are, in proportion to the frequency of the offence, exceedingly rare. This probably arises, in part at least, from the fact that the Crown authorities do not seem to think it necessary to prosecute in cases of unsuccessful perjury. Of course, in the most glaring cases of perjury the crime defeats itself, and these are the only cases where any public attention is drawn to the commission of the offence. The authorities pay no regard to public comment, unless their attention is officially called to the matter; the judge takes no action; the successful party is too content with his victory to trouble to move in the matter, and so the scandal is suffered quietly to die out. On the other hand, where the perjury is successful, and, in spite of all the shrewdness and experience of our judges there can be no doubt that such cases do frequently occur, the matter is never brought to the cognizance even of the public. The judge has by his finding evidenced his own faith in the perjured witnesses, and no matter how elaborate may be the investigations of the losing party, no matter how strong the case he may be able to present, the authorities prudently perhaps decline to take any action upon his representations, because they have learned by experience that, in the opinion of every unsuccessful litigant, the opposite party owes his success to perjury.

It is a mistake, we think, to conclude that because perjury has proved unsuccessful, therefore it is unnecessary to take any action upon it. Such action is the sole protection to the public against the repetition of the offence in other cases where perhaps it may prove successful, and we hold it to be the duty of the presiding judge in every case where he is satisfied that wilful perjury has been committed, either to punish the witness summarily as for contempt of court, or else to report the matter to the authorities. Take the case of an action of divorce, and in no class of cases is perjury more frequent. Half a dozen witnesses concur in testifying that at a certain place, date, and hour they saw E. and F. together. E. on oath denies that he ever met F. at the place deposed to, or

that they were together at all on the date mentioned. Now the charge of adultery, as remarked the other day by Lord Young in the course of a discussion in the Second Division, is really a criminal charge, conviction of which involves consequences as serious as most criminal convictions, and the evidence of which should consequently be as strictly weighed as the evidence in any criminal trial. Nevertheless the judge is so satisfied of the truth of the evidence of the witnesses who speak to the alleged meeting, that he has no hesitation, on the strength of that evidence, of convicting F. of adultery with E. Now the evidence that E. committed perjury is just as strong as the evidence that F. committed adultery, and yet no action is taken upon the matter. The judge who convicts F. neither punishes E. nor reports his conduct to the authorities. Yet to us it seems that the crime of perjury is just as heinous, just as injurious to public morality, just as subversive of social order, as the crime of adultery, and we see no reason why the judge who convicts of the latter offence should refrain from punishing the former. In all probability the judge who does not think it worth while to report a case of deliberate perjury occurring in his own court, would find it quite inconsistent with his public duty to refrain from reporting to the authorities a case of petty larceny occurring in his own apple-yard. In fact, by the time a lawyer reaches the bench, he has heard so much perjury, that, so far from being shocked by it, he has come to regard it as one of the ordinary incidents of a trial, a thing which he must bear with and make allowance for, just as the mariner has to bear with and make allowance for the deviations of the compass. No doubt he is sorry when a witness perjures himself, just as he is sorry to find a badly-lying ball at golf; but as little does he hope for immunity from perjury in his court, as for immunity from bunkers upon the links. In a recent divorce case three witnesses swore positively to their having been eye-witnesses of an act of adultery. Nevertheless the Lord Ordinary refused to grant divorce, remarking of the story, "You may call it conspiracy, or what you please, but the Lord Ordinary does not believe one word of it." To this finding the Inner House adhered, yet no proceedings have been instituted, either at the instance of the Court or otherwise, against those witnesses thus solemnly declared by the Court to have been guilty of perjury. Again, in a notorious affiliation case, which was recently before the Court, the Lord Ordinary, although he assoilzied the defender, found that he had told a tissue of falsehoods; and in that conclusion the Inner House fully concurred, Lord Deas remarking that the defender had been guilty of "most shameful lying." In this case, as in the other, no steps have been taken to bring what was at once a highly criminal offence and an insult to the Court under the cognizance of a criminal judicatory. Every petty crime, no matter where committed,—in Orkney or in Galloway,—must be

duly reported to the advocate-depute in Edinburgh, who is himself a daily witness in the Parliament House of the commission of a crime, heinous no less legally than morally, and of which nevertheless the officers of the law take no cognizance.

We have suggested two ways of dealing with the offence, a report by the Court to the Crown authorities, followed by a prosecution for perjury, or a summary conviction and punishment by the judge before whom the offence is committed. The former method should be adopted in all the graver cases of apparent conspiracy or subornation, and also in those cases where to the presiding judge some inquiry may seem to be necessary or desirable; the latter expedient, that of summary conviction, should be resorted to only in cases of glaring and palpable falsehood or prevarication. There can be no doubt that the Court has an inherent power to inflict this latter form of punishment, and it has frequently exercised that right. Baron Hume (2. 140) lays it down that a witness may be summarily committed for prevarication, and remarks that the cases in which this had occurred were "so numerous that no enumeration of them was practicable." He cites the case of Holmes, 9th and 10th December 1799, where a witness was sentenced for prevarication upon oath to eight days' imprisonment, and to stand for an hour in the pillory, one of the last occasions, we should think, in which this latter form of punishment was inflicted in Scotland. Alison (2. 549) deals with the subject somewhat more fully: "Any prevarication, perjury, or wilful concealment of the truth by witnesses in the course of examination, or any attempt to bias, corrupt, or direct their testimony, may be either summarily punished upon the spot by instant committal to gaol, or made the subject of petition and complaint at the instance of the public prosecutor, or of committal for regular trial, or indictment for perjury or subornation. There are numerous precedents in our practice for such offences being punished in all the three ways." Farther down he refers to the frequency with which the Court at that time exercised this right.

"There is hardly a Circuit now, especially at Glasgow, where several witnesses are not subjected to imprisonment for various periods, from six weeks to four months, for offences of this kind."

From the cases he cites, it would appear to have been not uncommon to add to the sentence of imprisonment for this offence, a direction that for one month of the term the prisoner was to be fed on bread and water.

After this date (1833) the custom of dealing with witnesses in this summary way seems gradually to have died out, indeed there are not half a dozen reported cases in the books subsequent to 1840. The last case of the kind we have been able to find is one reported in 1867 (Baxter, 5 Irv. 351), where a witness was sentenced to fourteen days' imprisonment for prevarication upon oath.

The infliction of a summary sentence for perjury or prevarication would therefore be no innovation, but simply a return to an excellent practice which has unfortunately fallen into desuetude, and the plan is commended by the consideration that punishments which, however short, are swift and certain, are always the most efficacious. The uncertain prospect of a possible prosecution for perjury at some distant date, followed perhaps by six months' imprisonment, is far less efficacious in restraining a witness from perjury, than the prospect of his finding himself, even within the next half-hour, the inmate of a prison cell, duly committed there to remain for the next thirty days. This plan, too, has this further advantage, that it ensures some punishment, however inadequate, which a prosecution for perjury does not. No conviction is more difficult to obtain than a conviction for perjury, unless, indeed, it be a conviction for fire-raising. The unwillingness of juries to convict of this crime is hard to explain, unless it be that the very fact that the cause which they are called to try has reference to the alleged falsity of certain evidence, disposes them to look with suspicion upon all evidence whatsoever. A citizen of Glasgow, returning home between ten and eleven on the last night of the year in that state which, to judge by the evidence one hears in the Glasgow Circuit Court, is quite chronic amongst the more respectable classes of that city, is set upon by two men and robbed of his watch. One of the men is caught and detained upon the spot, the other, A., makes off with the watch. Next day, however, A. is arrested from the description given. The watch turns up at a pawnshop, and the pawnbroker identifies A. as the person who pawned it. The man robbed has no difficulty in identifying him, and he is also identified by the policeman who arrested the other man, and by a little girl who was passing at the time. Another policeman identifies the two men as associates, and swears that he saw them together on the night in question, an hour before the crime was committed. The advocate-depute is about to call another policeman to depone to a similar effect, but, warned by the growing impatience of the judge, he proves his previous convictions, and closes his case. "Anything to be said, Mr. C.?" inquires the judge of the prisoner's counsel, in a tone which too clearly implies that in his Lordship's opinion Mr. C. may spare himself the trouble. But to the surprise of the Court Mr. C. intimates to his Lordship that he proposes to lead evidence for the defence. "Have you any intimation of this?" asks his Lordship of the advocate-depute; but, alas! it happens to be the second day of the Circuit, and Mr. C. has given the poor's agent the tip, so this loophole is shut, and his Lordship must needs resign himself to hear the evidence. After all, it does not take long. Mr. C. has precognitions from six witnesses, but only one of these turns up, B., a pal of the prisoner A., who swears positively that he and A. were together in the theatre on the last

night of the year from nine to half-past eleven o'clock, and that thereafter A. accompanied him home. The jury, without retiring, find both prisoners guilty as libelled, and they each get seven years' penal servitude. Now it is quite certain that the evidence that A. committed the robbery is no stronger than the evidence that B. has committed perjury, yet ten chances to one, were B. put upon his trial before a similarly constituted jury on a charge of perjury, the verdict would be one of *not proven*. Evidence quite good enough in the eyes of a jury to send one man for seven years into penal servitude for robbery, is not good enough to send another for six months to gaol for perjury.

No doubt there are cases, and perhaps the one which we have figured above is one of that class, where it would not be safe for the judge summarily to inflict punishment for perjury without any inquiry or opportunity for a defence. Without the co-operation of the Crown authorities, it is impossible to deal with such cases; and the Crown authorities have hitherto shown no disposition to take up the matter. They find their excuse in the difficulty of securing convictions for this offence, but we suspect that the very rarity of such prosecutions has a good deal to do with this difficulty. Were the authorities to set themselves resolutely to the task of dealing with offences of this kind, they would no doubt at first experience some rebuffs in the shape of unwarrantable acquittals, but a resolute perseverance in such prosecutions, without regard to the result, would very soon accustom the public, from which juries are drawn, to regard perjury just as they regard robbery, as a crime which cannot be tolerated; and which must be put down with a high and strong hand.

By the means we have suggested, the bench and the criminal authorities might do much to purge our courts of perjury, but it is also, we believe, in the power of the legal practitioners to co-operate in the matter. There are few practitioners indeed in Scotland, even amongst the very offscourings of the profession, who would deliberately encourage or abet a witness in giving false evidence, but we fear that there are many practitioners who do not use to their full extent their undoubted right of preventing evidence favourable though false, from being presented to the Court. Practitioners, like juries, are, we fear, not sufficiently alive to the heinousness of the offence of perjury, and are too much disposed to regard it with indifference, or even to treat it with levity. Nothing could be more calculated to give colour to the prevalent charge of unscrupulousness against the profession. After all, the man who avails himself with equanimity of evidence which he believes to be false, is not one whit less corrupt than the man who pockets with complacency money which he believes to have been stolen. We tread perhaps on dangerous ground in making any remarks which may seem to cast doubt upon the honour or the honesty of any branch

of the profession. We have ventured to do so, not because we believe that any large number of the profession are knowingly guilty of conduct which is dishonourable, but because we believe that the eyes of many are shut to the true character of the offence of perjury. The atmosphere of our courts has become so tainted that our nostrils have grown accustomed to the poisoned air, and we fail to perceive how foul it really is.

JURISDICTION FOUNDED UPON CITATION.

Two cases have recently been decided upon the same day by Lord Lee, which both raised the question of the effect of citation in creating jurisdiction, viz. *Prescott v. Graham*, and *Pickering v. Aitken*, February 2, 1883. They are instructive as illustrating how such a question is affected by the special circumstances of each case. In *Prescott v. Graham* these circumstances were as follows:—A Scotchman had gone to Singapore, and had been settled there for a number of years. In September of last year he returned to Scotland upon a temporary visit, with the intention of returning to Singapore. While residing with his father in Edinburgh, he was personally cited by an English creditor who had supplied him with goods at Singapore. The Lord Ordinary found that “by his return to Scotland, and personal citation therein after a residence there as aforesaid for upwards of forty days, the defender, at the date of citation in the present action, was subject to the jurisdiction of this Court.” In coming to this conclusion the Lord Ordinary does not seem to have had much doubt upon the question whether or not the defender was settled in Singapore *animo remanendi*. On the contrary, he was inclined to hold that had defender died in 1881, his domicile for the purposes of succession might have been found to be in Singapore, and that his return to Scotland was for a temporary purpose. But he was of opinion that the question of jurisdiction did not depend upon that of domicile. The authorities upon which he founded were *Ritchie v. Fraser*, 15 D. 205, and *Joel v. Gill*, 21 D. 929, and he observed that “the general principle established by these cases is, that residence within the judge’s territory gives the judge jurisdiction over the person, and that it is for each country to determine as matter of practice what it will account to be sufficient residence to form a domicile for jurisdiction.” In *Ritchie’s* case the facts appear to have been very similar, and the point which it seems to have settled is, that the residence in the case of personal citation need not have been continuous. The defender had come to Scotland from America in May, and left in July. During this period of two months there had been visits paid to Ireland and England, in consequence of which he never was forty days continuously in

Scotland. Upon this subject the Lord President (M'Neill) said: "I do not know that it is anywhere laid down that forty days' continuous residence is necessary. If it were, then a native Scotchman who returns home permanently, but goes to London on business every month for a day or two, would never acquire a domicile here so as to create jurisdiction, not having resided for forty days continuously during any portion of that period. Therefore there are interruptions of continuity which cannot take off the permanent character of the residence. On the other hand, suppose a foreigner residing here for two or three days every month during a long period, that would not create jurisdiction—even although the sum of these residences should amount to forty days." The case of *Joel* is one which might well be quoted by English lawyers in reply to recent complaints which have come from Scotland relating to the encroachments of the London Courts. Joel was an Englishman, with English debts and English creditors, who, being desirous of a cheap sequestration, which he did not think his own country could afford, came to Tobermory, and resided forty days in furnished lodgings. The Scotch Courts held that he had become subject to their jurisdiction, and refused to recall the sequestration which had been awarded. These cases are to be contrasted with that of *Johnston v. Strachan*, 23 D. 758, where the summons was served after the defender's departure from Scotland. This was also the case in *Pickering v. Aitken*, already referred to as having been decided by Lord Lee. The defender Aitken had left Scotland for New Zealand, but returned to Scotland in May 1882, leaving, however, his family in the colony, where he had a furnished house. He resided during his visit to Scotland with his mother in Edinburgh. In October 1882, he left Scotland for New Zealand, and *two days* after his departure a summons was served at his mother's house, being put into the hands of a servant. In his judgment, Lord Lee remarked: "It is said that permanent domicile is not required, and that a forty days' residence, according to the law of Scotland, implies a domicile sufficient to constitute jurisdiction, and to support the citation. Had the defender been found within the territory, and personally cited, I think that the authorities would have supported this contention. But *Johnston v. Strachan* shows that there is no implied retention of that domicile of citation after actual departure from Scotland. In the absence, therefore, of personal citation within the territory, and of proof of actual possession of a dwelling-place, I think that jurisdiction cannot be founded against a foreigner by a mere citation at the dwelling-house last occupied."

In Aitken's case the pursuer was in fact too late, for had the summons made its appearance a few days earlier, the circumstances of that case would have been precisely similar to those of *Prescott v. Graham*.

THE COURT OF SESSION IN 1819 AND 1820.

BY A PARLIAMENT HOUSE CLERK OF THAT PERIOD.

SECOND ARTICLE.

(Continued from page 263.)

MR. ROBERT FORSYTH was a largely engaged and most laborious advocate—a complete *glutton* in work. He was educated for the Church, and it was said had actually obtained licence as a preacher, and on that account some objection was taken to his admission into the legal ranks. He had written and published two volumes of historical and pictorial sketches of his country, under the title of the *Beauties of Scotland*, which were generally to be found in almost every house. He especially made himself famous by composing the article “Botany” for the *Encyclopædia Britannica*. He was said to be profoundly ignorant of that science. He was in use to say humorously that he did not know a *nettle* from a *docken*, save from the sting of the former, and the soothing powers of the latter—always providentially found in the immediate vicinity—the bane and antidote. By a laborious study of many of the best books on the science, he produced a treatise which for years was held to be the very best on that intricate subject. Mr. Forsyth’s house was at the top of the Mound, where the Free Church Assembly Rooms now stand. In consequence of the vicinity of his dwelling-house, he long was the first to tread the floor of the Outer House. He generally appeared at half-past eight in the morning, and promenaded in solitary grandeur from one end of the Hall to the other, or when he read his papers he uniformly occupied a particular seat not far from the stove. One morning Mr. Jeffrey came early to the House to attend a debate before one of the Lord Ordinaries. Meeting Mr. Forsyth in his pedestrian tour he addressed him thus, “Have you your dormitory here?” The answer was, “Not exactly, but I uniformly take my morning walk in this Hall.” “Ay,” answered Jeffrey, “you reckon it as your *Botanic* garden, where you cull the sweet flowers of *rhetorick*.”

Mr. L’Amy had an extensive practice, chiefly from the northern counties. He was a distinguished “*Royal Archer*,” and from his chubby and rubicund appearance obtained the appellation of “*Cupid*.” He was appointed Sheriff of Forfarshire. At that time the whole judicial business of the county was transacted in the county town of Forfar. On the first occasion of Mr. L’Amy having a jury trial there, he deemed it prudent to emulate the Circuit Judges in their State processions at Perth, and to awe the people of Angus by a similar display of the pomp and majesty of law and justice. So, on the morning of the court day he arranged a short walk from his hotel to the Court-house. A couple of

stalwart policemen in their Sunday clothes, with batons, walked first. Blue coats or blue bottles were then unknown. No mace (that mysterious sign of majesty) preceded the Sheriff; but the approach of justice was heralded by the town drummer, in red jacket, beating, as was jocularly said, the "*Rogue's March*," as a terror to all evil-doers. The Sheriff stoutly denied the ambiguous tune. The Sheriff came in the centre of the pageant in full court dress, with wig, gown, and sword, astonishing the Forfarrians, especially the children, whilst the clerk and fiscal brought up the rear. It is said that the cavalcade was not so successful as to encourage its repetition.

At this time a Liliputian of rather Æsopian type passed advocate. He had been for some time a writer in Dundee, where he had acquired distinction for his intimate knowledge of mercantile law, especially concerning maritime transactions. He was advised to attempt a higher sphere, and did so. For a time the movement seemed not to be a success. At length an insurance case occurred involving a large sum, with questions of general average and the modes of *jetsam* and *flotsam* and intricate accounting. The case was laid before Mr. George Cranstoun (subsequently Lord Corehouse, who previously had followed a military life). Appalled at the intricacy of the case, and learning the qualifications of the newly-called advocate, he recommended that the paper ordered should be framed by him, but to which, after perusal, he gladly attached his own subscription. When the case was advised in the First Division, every successive judge spoke in praise of the huge volume which had been laid before them, declaring that it was more a treatise on a branch of law little known and studied than a mere pleading. Mr. Cranstoun (if ever man possessed a silver-toned voice it was he) at once honourably disclaimed all merit in the minute or memorial, but united with the bench in encomiums on the talent and industry displayed by his young friend in compiling the paper. It was said that in consequence of this event, next morning found some half-dozen of cases on the young advocate's table. Business increased, but with the rapid increase the health of the counsel suffered, and ere long he fell a victim to incessant labour.

At that period cases were generally conducted by written or printed papers, and perhaps more study and precision were observed than subsequently, when the whole procedure was transacted by oral pleading.

Certain advocates were known as *Chamber Counsel*. They gave opinions on memorials and framed minutes of debate for the court, and representations against the judgments of Lord Ordinaries, which were then unlimited unless dispensed with, and who seldom appeared in court, leaving that to junior counsel.

There was no doubt that Mr. Clarke and the senior members of the bar had no great love for jury trials. The Jury Court formed then a distinct and separate tribunal, and cases were transferred in

shuttle-cock fashion from one court to another, the one for mere trial of fact, the other for the application of law to the fact.

Mr. Adam was the Chief Commissioner, and Lords Gillies and Pitmilley the puisne judges, who when sitting in the Jury Court wore the robes of English judges, much to the dislike of the Scotch bar. The Jury Court was made the frequent subject of joke. A conundrum passed current, "Why was the Jury Court like *Eden*?" "Because," was the reply, "it was made for *Adam*." It was declared to be a political *job*. Unfortunately for this sarcasm, the first clerk was "John Osborne Brown," and in consequence all papers in that court bore his initials in large text *J O B*. There can be no question but this dislocation of the courts created great dissatisfaction, and it is doubted whether even now, though an integral part of the Court of Session, trial by jury is yet a favourite with the public. The unanimity of the jury, so different from juries in criminal trials, was long a great objection, and even now the starving of the jury to compel verdicts on lesser numbers, for which no definite rule has ever been found, is far from being satisfactory, and far diverse from the practice in England.

NESTOR.

THE LORD CHIEF JUSTICE ON THE GROWTH OF THE LAW.

THE summing up of the Lord Chief Justice in the case of *The Queen v. Ramsey and Foote*, the blasphemous libel case, has just been issued in the form of a pamphlet, with a preface by the learned judge. The terms of the summing up have excited some controversy, and there is no doubt that some portion of it does illustrate a standing difficulty with regard to that part of the common law which depends on tradition and precedent, and not on express statutory enactment.

The portion of the summing up to which we refer is that in which the Lord Chief Justice states that the common law alters according to the changing circumstances of the times. He admits, in this part of the summing up, that, "according to the old law, if the *dicta* of old judges, *dicta* often not necessary for the decision, are to be taken as of absolute and unqualified authority," the publications in question were "undoubtedly blasphemous libels, simply and without more, because they question the truth of Christianity." He proceeds to say that those *dicta* cannot be taken to be a true statement of the law, as the law is now, and that it is no longer true, in the sense in which it was when these *dicta* were uttered, that Christianity is part of the law of the land. He says: "Therefore, to base the prosecution of a bare denial of the truth of Christianity *simpliciter* and *per se* on the ground that Christianity is part of the law of the land, in the sense in which

it was said to be so by Lord Hale, and Lord Raymond, and Lord Tenterden, is, in my judgment, a mistake. It is to forget that law grows ; and that though the principles of law remain unchanged, yet (and it is one of the advantages of the common law) their application is to be changed with the changing circumstances of the times." It seems to us that it is undoubtedly true, and no candid intellect can deny, that, by a gradual process, the law does and must change with the times in the sense that it is from time to time modified by the judges who have to declare it without the intervention of statutory enactments, and we think that in his charge the Lord Chief Justice has duly recognised what is the fact in this respect, though we are disposed to think that a judge should be somewhat chary of emphasizing this fact too strongly. Human nature is so constituted and human affairs are so carried on, that it is sometimes right to do things without proclaiming too expressly what it is that you are doing.

No one can doubt that a very different attitude is taken by judges in enunciating the law on many subjects from that which would have been taken a hundred years ago. Some judges are accustomed occasionally to protest against the alteration of the law by the judges in this way, and to say that it ought to be altered, if alteration is required, openly, by statute, not covertly, under profession of declaring it as it has always existed. No doubt this process of alteration of the law by judges is to some extent in conflict with the theory of common law which supposes it to be based upon immemorial tradition, the origin of which is lost sight of, and it has generally been the practice of judges to assume that the law they enunciate, when not the creature of statute, is the law as it has always existed. We doubt whether any judge has ever propounded from the bench, as distinctly as the Lord Chief Justice in this charge, a view so expressly at variance with the ancient theory on the subject of the common law. Notwithstanding the protests to which we have referred, this gradual alteration of the law without statutory intervention is, in many respects, and with regard to many subjects, inevitable. The law must in many cases remain absolutely rigid, and so become more and more absurdly inconsistent with existing ideas, or it must be so altered. There are matters as to which there are a host of practical difficulties in the way of legislation. Matters relating to religious belief are pre-eminently examples of what we mean. It is hardly necessary for us to illustrate the truth of this. Let any one consider by the light of what occurred with reference to the last Affirmation Bill what difficulties would have beset any attempt to define blasphemy exhaustively by Act of Parliament at any time between the times of the ancient sages of the law of whom the Lord Chief Justice speaks and the present day. We quite agree that, so far as possible, the general tendency should be to preserve the law *in statu quo*, in accordance with ancient authority and

precedent, leaving desirable alterations to be effected by statutory enactment by the proper legislative authority. If this were not the general rule, the law would become uncertain and dependent on the views and temperaments of particular judges to a dangerous extent. But we cannot think that the common law can be treated as so absolutely fixed and rigid as is contended for, with regard to matters as to which the views and whole mental attitude of the community of necessity change largely in the process of time, while circumstances render it impossible or too difficult in the nature of things to embody those changes in legislative enactments. It seems to us that any attempt on the part of a judge to treat the subject of blasphemous libel at the present day as it would have been probably treated by some judges in ancient times, would create a storm of indignation and ridicule.

It is somewhat curious to observe that, though the Lord Chief Justice, in general terms, in the earlier part of his summing up, lays it down as a necessary axiom that the law must change with the changing circumstances of the time, and that the attitude of the law has changed on this subject; yet, when he comes to deal with the actual authorities, he does appear to contend that the effect of them has all along been what he proceeds to lay down—viz. that it is open to any one to attack Christianity, provided that he does so decently and respectfully. He says, “But upon the other point, if the law as I have laid it down to you is correct,—and I believe it has always been so,—if the decencies of controversy are observed, even the fundamentals of religion may be attacked without a person being guilty of blasphemous libel.” We are not prepared to express any opinion as to the proposition that this has always been so. It would require a protracted investigation of ancient statutes and authorities to form any conclusion on the matter. Undoubtedly, from the time of the Restoration downwards, writers have from time to time flourished, whose writings were substantially, if not in form, arguments against the truth of Christianity, without being prosecuted for such writings; but if the law has always been that the fundamentals of religion may be thus attacked without a person being guilty of blasphemous libel, we hardly see why the Lord Chief Justice need have philosophized in the earlier part of his summing up with regard to the necessary growth of the law and its adaptation to surrounding circumstances, much as we agree in substance with what he said.—*Solicitors' Journal*.

REMARKS ON RECENT ENGLISH CASES.

Testamentary capacity—Disposing mind.—The law as to testamentary capacity laid down by Sir James Hannen in the case of *Parker v. Felgate and Tilly*, July 7, is rather startling, at least to Scottish lawyers. If at the time of executing the will the testator

did not understand, and indeed was not capable of understanding, the terms of the will, we should say unhesitatingly that the will was no will; the testator had not a disposing mind. It appears to be otherwise in England. If a person, although unable to understand the contents of a will, is able to give assent to one which he believes to embody, and which does embody, instructions formerly given, that is a valid will. The whole circumstances in which the doctrine in question was laid down are so remarkable and so unfavourable to holding a will to be valid, according to our ideas, that it is worth while to recount them.

The testatrix, who was ill of a disease that almost invariably proves fatal, being desirous of making a will in favour of her family and a charity, gave instructions to her solicitor, who had numerous interviews with her on the subject. Her father and eldest brother were in business, and as things were not going on well with them, the contingency of their becoming bankrupt was referred to in conversations about the intended will, and the direction was that if anything happened, a clause was to be inserted in the will to prevent their bequests going to the trustee. There were full entries in the solicitor's books of instructions for making a will. A draft will was prepared, the lady gave instructions for making alterations on the draft, and the will was engrossed. Before any will was executed, the solicitor left town, the lady's illness reached a very serious stage, and, on the 22nd August, the father and brother became bankrupt. The solicitor's partner was applied to by the family, and in accordance with what he understood to be the general intention of the testator expressed in her instructions, a clause was inserted in the will, directing the executor to pay the legacies to the father and brother for their personal use, as he in his discretion might think fit.

On the 26th of August the lady sank into a semi-comatose condition, in which she continued till her death. One medical attendant stated that after the partial coma set in, she was capable of being roused, and could speak, but he added, "I could hardly say she was perfectly rational," an observation which the learned judge remarked was to be taken as qualified by the statement that she could be roused to speak, and that she answered questions. On the 29th of August, three days after she had sunk into a semi-comatose condition, the will was executed. The lady was unable to adhibit her signature, but the will was signed for her by a lady in her presence, and, as alleged, at her desire. By the Wills Act of 1837, the will may be signed by the testator, or by some other person in his presence and at his desire (section 9). What took place at the execution of the will was this:—A medical man, who had been specially called in to give a fresh and independent opinion as to the lady's mental capacity at the time, stated that she opened her eyes, put out her hand, and smiled; he rustled the will in front of her face, and thus roused her up. He said, "This is your will;

do you wish this lady to sign it?" and she replied "Yes." The witness added, "As far as I could judge, she understood what she did." There can be no doubt from this, and the testimony of two other of the persons present, that the lady did say "Yes," but it was in so low a tone, or so indistinctly, that the lady authorized to sign it inquired, "Does she say 'Yes'?" and a nurse at a farther corner of the bed said she could not hear the "Yes" distinctly, but understood the sound to mean "Yes." This was all the authority given to sign the will, and the will was signed. The jury, in answer to distinct questions put by the judge, found (1) that the testatrix, when the will was executed, did not remember and understand the instructions to make the will which she had given to her solicitor; (2) that, even if roused, she could not have understood each clause of the will, but (3) that she was capable of understanding, and did understand, that she was executing a will for which she had given instructions. They further found that the testatrix had given instructions for the insertion of the clause as to the bankruptcy. On these findings the judge pronounced for the will. The law which the learned judge laid down as applicable to the decision was as follows:—

"As to the requirements of the law in respect of due execution, if a person has given instructions to a solicitor to draw a will, and after these instructions the solicitor has drawn a will, in my judgment it is in law a valid will, if the person assents to his signature being put to it while in this frame of mind, 'I made a disposition of my property, and gave my solicitor instructions to carry it out. No doubt he did so, and I accept what he did as a carrying out of my intentions.'"

According to the general understanding, a will is the expression of a person's mind and intention as to the disposition of his property *at the time of execution*. According to this doctrine, it may be merely the expression of his mind and intention as to the particular disposition of his property at an antecedent period. A will, in this way, may be made at one time and executed at another. In such circumstances as those we have stated, the will that actually takes effect is the unsigned and unattested instructions which have been given antecedently. There is little room for change of intention in such a case between the time of giving instructions and the time of executing the will. The testator cannot change his mind at the time when he is asked to execute the deed; he does not know what it is in the deed that may require change, and he has not a mind which can make a change. If this doctrine is to prevail, we had better give up the phrase "disposing mind," and can hardly even substitute "assenting mind." According to our understanding of it, the law has required not only assent, but the assent of a mind fairly in possession of its faculties of memory and understanding. It is interesting to notice the kind of mind that the maker of the will is supposed to have had at the time

when she gave authority to sign the will, what faculties were gone, and yet what faculties remained. The mind was not active enough to be made capable by rousing it to understand, or to be made to remember the dispositions of the will, but it was capable of understanding that she had given instructions, and, even without being roused, of remembering that she was satisfied with these directions at the time, of feeling that she was satisfied these instructions had been carried out, and also of remembering without any assistance that she had not changed her intention. This seems a curious kind of mind. There is this also to be considered: Upon what evidence does the disposition of property rest in such a case? In this case, for instance, it rests solely upon the statement of the solicitor. Better that we should allow of nuncupative wills at once. It seems to us that this is a most perilous doctrine, and it is easy to see what opportunities of fraud it would introduce. On a point like the present it is difficult to find anything in the way of authority, for the simple reason that the contrary has been so well understood as to be taken for granted. But in the case of *Hastilow v. Stobie*, L. R. 1, P. & D. 64, where some elementary propositions had to be referred to, Sir James Wilde remarked, with reference to the contention that a will might be good although the testator did not know the contents, that if this were so, "it would no longer be necessary to show that a testator was, in the old language of the law, of sound mind, memory, and understanding. These words have been time out of mind held to mean sound disposing mind, and to import *sufficient capacity to deal with and appreciate the various dispositions of property to which the testator was about to affix his signature.*" Even as to the question whether the lady gave authority to sign the will, when a lady who is sinking to death, who has been in a semi-comatose condition for days, after being roused merely says "Yes," in a tone so low that people at the other end of the bed cannot make out what she says, we gravely doubt whether that is sufficient authority to do such a solemn act as signing a will. In such a state of body and mind, the sufferer would say "Yes," or something like that sound, to anything she was asked.

Carrier—Duty implied from course of employment.—In *Cunnington v. Great Northern Railway Co.*, decided by the Court of Appeal, July 2, it appeared that plaintiff had for some years supplied Messrs. Crosse & Blackwell with ketchup. Crosse & Blackwell sent by defendants' railway empty casks which the plaintiff returned filled with ketchup. On one occasion the railway company delivered to the plaintiff wrong casks which had been filled with turpentine, and being refilled without examination, the ketchup was spoiled. The Queen's Bench Division allowed a demurrer on the ground that the statement of claim alleged no contract, or in the absence of contract that there had been fraud or misrepresentation by the railway company. The

plaintiff appealed, arguing that the statement of claim alleged a long course of employment of the railway company by the plaintiff of casks to be sent filled, returned empty and refilled, and that the railway company were aware of the purpose for which the casks were to be delivered. This it was contended disclosed a cause of action. The Court of Appeal (Brett, M. R., and Fry, L. J.) dismissed the appeal, not entirely agreeing, however, with the views expressed in the court below. The opinion of the Master of the Rolls as to the liability of persons in the position of the railway company in such circumstances was to the following effect. Whenever facts disclosed in a statement of claim are such that if the person charged with negligence had thought about what he was going to do, he must have seen that unless he used reasonable care there would be at least great probability of injury to person or to property being caused to the party charging him with negligence, then a duty was shown to use reasonable care. Here, however, it was not alleged in the statement of claim that the railway company knew that the plaintiff would use the casks without examination, so that the facts did not bring the case within the rule stated. His Lordship guarded himself from being supposed to agree with the view, that to found the claim there must be either breach of contract or misrepresentation. There might be a breach of duty and cause of action falling short of that.

Passengers' tickets—Conditions totally exempting from liability.—In an article in the *Journal* on "Limitations of Carriers' Liability," vol. xxiv. p. 475, it was stated that the later common law, as unaffected by the alterations made by the Railway and Canal Traffic Act, was to the effect that a special contract assented to must be held binding, however far the conditions limiting the responsibility of the carrier might be carried. In *Haigh v. General Mail Steam Packet Co.*, 52 L. J. Rep. 395, conditions in a passenger's ticket were given effect to so as to exclude liability for loss of the passenger's life through the negligence of the company's servants. In the ticket issued by the defendant company for a voyage from Rio de Janeiro to Southampton, there were among a great number of other conditions: "The company will not be responsible for any loss, damage, or detention of luggage under any circumstances . . . nor for any delay arising out of accidents, nor for any loss or damage arising from perils of the sea, or from machinery, boilers, or steam, or from any act, neglect, or default whatsoever of the pilot, master, or mariner." The conditions were undoubtedly assented to, the ticket being signed by the passenger. The steamship, it was alleged through the fault of the company's servants on board ship, came into collision with another ship, and in consequence sank, and the passenger was drowned. The passenger's executors, on behalf of his widow and children, sued the company for damages. The

company pleaded in defence these last conditions excluding liability for any loss arising "from perils of the sea, or from any act, neglect, or default whatsoever of the pilot, master, or mariners." The Court held that the claim of the passenger's representatives was excluded. The validity of conditions so extensively excluding liability seems not even to have been questioned, and the only contention was that these conditions covered injury to property alone, not loss of life. Even this contention was not given effect to. Mr. Justice Cave observed: "When I find that there is a special provision with respect to loss, damage, or detention of luggage, and that after that the notice goes on to deal with the relation of the company to the passengers, and in the course of dealing with them goes on to provide that the company will not be responsible for any 'loss or damage arising from perils of the sea, etc.,' I am driven to the conclusion that that means injury to life or limb from the causes there enumerated." Conditions totally excluding liability for loss of luggage were given effect to in a case noted in the article already referred to; see vol. xxiv. at p. 551.

Construction of statute.—A curious point was raised in *Forsdyke v. Colquhoun*, L. R. 11, Q. B. Div. 71. The Licensing Act of 1874, which directs public-houses to be closed "during certain hours on Sunday, provides that they shall be closed on Christmas day and Good Friday, as if Christmas day and Good Friday were respectively Sunday." The Welsh Sunday Closing Act of 1881 directs that all such premises are to be closed "during the whole of Sunday." This Act is not directed to be read along with the previous Act. The question was, whether licensed premises in Wales were to be closed on Christmas day and Good Friday as they were directed to be closed on Sunday by the Act of 1874, that is to say, during a portion of the day, or as they were directed to be closed on Sunday by the later Act, that is to say, during the whole day. The Court held, that they were to be closed as they were directed to be closed on Sunday by the Act which made provision for their being closed as on Sunday, the Act of 1874, that is to say, during a portion of the day.

Correspondence.

(To the Editor of the Journal of Jurisprudence, Edinburgh.)

VIRGIL AND SHAKESPEARE ON THE CARDROSS CASE.

12th July 1883.

SIR,—We know that "in ancient days the sacred name of poet and prophet was the same," and a phrase of Virgil has at length

been quoted in a Scots law-book as his vaticination of the result of summoning a General Assembly, instead of demanding damages from injurious individuals. But if Virgil's

—"tenuis recessit in auras"

appears to Mr. Lees to be happy, what shall we say to Shakespeare's far more exact dictum on a proposed action against a "spiritual body"?

"We do it wrong, being so majestic,
To offer it a show of violence,
For it is as the air invulnerable,
And our vain blows malicious mockery."

There is a difference between the two. The earlier prophet puts the difficulty as made by the ghostly defender, while the latter gives the objection to "show of violence" as occurring to the pursuer, if not as stated, *ex parte judicis*. But if Mr. Lees' juniors refer to the report (24 Dunlop, see pages 1283, 1284, and 1288), they will find that here also there is an exact anticipation from Stratford-on-Avon of the judgment to be delivered at Edinburgh on 9th July 1862.—I am, etc.,
A. B. C.

Obituary.

JOHN LOGAN, ESQ., W.S.—In the death of John Logan, W.S., who died at Edinburgh on 11th July last, in his ninety-first year, the legal profession has lost one of the now few surviving agents who, for urbanity of manner, sweetness of temper, and kindness of heart, combined with much shrewdness and careful attention to business, won for themselves an honoured place as trusted family advisers in the past generation. A native of Lanarkshire, Mr. Logan came to Edinburgh in 1809, and entered the office of Messrs. Mackenzie & Innes, W.S. He became a member of the Society of Writers to the Signet in 1829, and afterwards as a partner joined the firm which he had entered as an apprentice twenty years before. In this partnership he continued till his death, and in its management he took an active part till within the last two years. It is a rare event to record an active connection of seventy years in one business, and sterling must have been the qualities of heart and mind, as well as the business capacity of the individual, a review of whose life makes it possible to do so. Such were the possession, by nature and cultivation, of John Logan; and whether it be the professional brother, the casual visitor on business affairs, the partner of the firm, the employee of the house, or the old family client, one and all will unite in the widespread regret at the death of one who has left behind him a very precious memory. In public affairs

Mr. Logan took little active part ; but in the church with which he was connected, Free St. Stephen's, Edinburgh, he was for long a very honoured elder. Mr. Logan is survived by two sons and a daughter. The elder son is a minister of the Free Church of Scotland, and the younger, Charles Bowman Logan, W.S., is now senior partner of the firm of Mackenzie, Innes, & Logan, W.S.

A. CUNINGHAM, Esq.—The late Alexander Cuningham, Esq., Writer to the Signet, who died on the 16th inst., at his residence in Palmerston Place, Edinburgh, in the seventy-ninth year of his age, was the second and last surviving son of the late Charles Cuningham, Esq., also a Writer to the Signet, of Newholm, in the county of Lanark, by his marriage with Elizabeth, daughter of John Weir, Esq. of Kerse, near Falkirk, N.B. He was born at Edinburgh in the year 1805, and was educated at the High School and University of that city. Mr. Cuningham joined the Society of Writers to the Signet in 1827, but did not actively follow his profession. Having entered the service of the Commissioners of Northern Lighthouses in 1826, he was appointed joint secretary with his father in 1842, and secretary in 1846 ; and in this capacity he continued to act till his retirement in 1875, on which occasion he was presented with a handsome service of plate by the officers, lightkeepers, and other members of the service, as an “ expression of their regard, and of their sense of the courtesy and kindly feeling with which for nearly fifty years he had discharged with unswerving integrity the responsible and onerous duties of these offices.” Mr. Cuningham took no part in public affairs, but he was for many years a director on the Edinburgh Board of the Scottish Amicable Life Assurance Society, by whom his services were much appreciated. He was a Fellow of the Royal Scottish Society of Arts, before whom he read many papers on subjects connected with the Lighthouse Service, and by whom he was awarded, in 1860, the “ Brisbane ” prize and medal for his “ Communication on an Uniform Code of Tidal Signals.” Mr. Cuningham married, in 1834, Caroline, daughter of Major-General Alured Dodsworth Faunce, C.B., who survives him, and by whom he has left six sons. The remains of the deceased gentleman were interred at St. John's Burying-ground, Edinburgh.

The Month.

Grotius and the Law of Nations.—It is with great pleasure that we hail any attempt to keep alive among men the memory of those to whom we owe so much as the founders of the modern Law of Nations. Pre-eminent among these stands out the name of Hugo de Groot, better known as Grotius.

But a short while ago, between the publication of our last and that of our present number, the whole kingdom of the Netherlands, we may say the whole world of letters, was celebrating the tercentenary of the birth of Grotius at Delft on the 10th of April last.

A National Committee has been formed at The Hague, consisting of some of the most eminent Dutch jurists and publicists, and their appeals are before the world, in an interesting article in the current number of the *Revue de Droit International* (No. 2, for 1883. Brussels: Libr. Muquardt), by M. Wijnmalen, Secretary of the Committee, as well as in the prospectuses which we have received from M. Coninck-Liefsting, Vice-President of the High Court of the Netherlands, which now lie before us.

The claims of Grotius to a place in the first rank of the thinkers of his day, and indeed of many a subsequent day, scarcely need to be repeated here. They have some time since been advanced in the pages of this *Review* by no less a pen than that of Sir Travers Twiss, in his discussion of the treatise *De Jure Prædæ*, published in the Netherlands. Another learned countryman of ours, the illustrious master of Trinity College, Cambridge, Dr. Whewell, stands godfather, so to speak, in this country, for the much more widely known *De Jure Belli et Pacis*. It seems curious that M. Wijnmalen should not appear to be aware of either of these English monuments to the memory of Grotius.

It is very true to say of Grotius, as the Dutch Committee say in their prospectus, that nothing escaped him. He had his predecessors, undoubtedly, and their value has been justly set forth by M. Nys in his *Droit de la Guerre et les Précurseurs de Grotius*, and by Count Saffi in his *Alberigo Gentili*, both of whose works have been noticed in this *Review*.

But these forerunners of Grotius no more take away from the actual merit of Grotius himself, than the so-called Reformers before the Reformation take away from the merit, whatever it may be, of the Reformers of the sixteenth century.

What both the thirteenth and the fifteenth centuries more or less consciously demanded, what the fifteenth century, in fact, unquestionably tried to accomplish, it was left to the sixteenth century to effect, though in a shape far different in many respects from that which would have commended itself to either of the previous periods.

The development of the reform of the Church was slow. No less slow was that of the formation of the modern Law of Nations. There are yet other similarities between the two. Both are still, in a certain sense, incomplete. The last seal has been set to neither.

The fifteenth century cried aloud for the reform of the Church in head and members. Now by head was meant the pope. But after the solemn proclamation of the doctrine that the Church was above the pope,—after the solemn deposition of pope and anti-

pope,—all that the fifteenth century Councils succeeded in doing was to restore John XXIII. to the cardinalate, to burn Huss, and to end in a sixteenth century Council, viz. the Council of Trent, which has not succeeded to this day in getting its canons received in some of the leading countries of Western Europe, themselves in communion with Rome.

So it is with the Law of Nations—Gentili, De Victoria, Ayala, Grotius, Zouche, and many another in different theological and juridical camps, have laboured to build up a perfect *Jus inter Gentes*. They have done what in them lay. They have laboured not by any means altogether in vain. There is a fair retrospect possible in the work of the doctors of the law of past generations. There is good hope for the success of the workers of the present and future.

The ameliorating effects of societies like the Institute of International Law, and the Association for the Reform and Codification of the Law of Nations, may plead Grotius as their exemplar, may cite him for their supporter, may hope to aid in making his humane views prevail in a perhaps not very distant future. It is doubtless possible, that if Grotius had been more of a partisan, his views would have found more ready acceptance to a certain extent. But he was not a party man, as is well shown in the extracts which M. Wijnmalen gives from M. Groen van Prinsterer's book—*Maurice et Barneveldt*. He sided, in fact, neither with Luther nor with Calvin. His school was rather that of Erasmus.

We cannot wish that Grotius had been more of a partisan. He occupies a far more truly great, and a far more really international position, from the fact that he is so much above and outside of party considerations. He thus belongs the more truly to the world at large. He is thus the more really a citizen of the world-state, of which all the various countries which unite in honouring him are themselves, as it were, but streets and houses.

We trust that a work so international in its interest as the monument to Grotius will draw to it the sympathy and co-operation of the world for which he laboured. So will the monument the more emphatically perpetuate the memory of one whose name should be kept green through all ages.—*Law Magazine and Review*.

The English Bar Committee Regulations.—We take the following from the *Law Times*, with reference to the regulations proposed by the Committee appointed at a meeting of the English Bar, held on 5th May last. The regulations have now been approved at another meeting of the Bar:—

“That most conservative body the Bar has at last recognised the fact that it can no longer continue to exist as a ‘fortuitous concourse of atoms;’ that, if its members are to live and thrive, their actions and their interests must be controlled by some sort of supreme council, and that matters have come to a crisis which

renders thorough organization an imperative necessity. No other profession is without a governing body of this kind, nor has the Bar itself been long in the state of anarchy which is the result, as it is also the symptom, of that decay of the circuit system which becomes more conspicuous every year. It may be that the Bar is not more hopelessly overcrowded than other professions, but it is certainly true that the number of barristers increases with alarming rapidity, and that in proportion to its growth is the increase of those who are attached to no circuit and are controlled by no rules except those laid down by etiquette and sanctioned in the dim background by the Benchers of the various Inns of Court. To the credit of the Bar it may be said that the need of discipline—although that too is occasionally obvious—was not the main cause of the great meeting which took place upon the 5th May. That meeting assembled because there was a general feeling that it was necessary to provide some machinery to supervise the practical interests of the whole body of barristers, and it has been by the publication of the regulations proposed by the provisional committee that the subject of this present article has been suggested. They are printed at length in another column, and, although it was inevitable that they should be directed for the most part to matters of formality and detail, they do nevertheless comprise some points of genuine importance. The first provisions touch the constitution of the proposed committee. Forty-eight of its fifty members are to be elected from the ranks of barristers in actual practice. The last is a somewhat vague phrase requiring intelligible definition. Of the elected members at least twelve must at the time of their election be members of the Inner, and at least twenty-four members of the Outer Bar. This is a fairly wholesome regulation, but open to adverse criticism, for, even when the system of rotation afterwards suggested is taken into consideration, it is probable that in course of time leading Queen's Counsel will possess an undue numerical influence in the committee. Other suggestions upon points of detail propose the manner of election, provide for the due representation of circuits which may have been imperfectly represented through accidental omissions, make the Attorney and Solicitor-General *ex officio* members of the committee, and so on. Beyond this the prospect is indefinite. Rule 18, which contains the real pith of the document before us, consists of nothing more than a proposal that the committee shall have power to carry into effect, according to their discretion, the second resolution passed at the Bar meeting, the effect of which was that they should collect and express the opinions of members of the Bar upon matters affecting the profession, and take such action upon them as might be deemed expedient. Nothing, therefore, has been done to indicate in the slightest degree the nature of the possible reforms, only the machinery by which change may be accomplished has been provisionally settled. For the reforms themselves we must

be content to wait until the committee to be elected on the 8th December has settled down to its work.

“At the present time, however, it may not be amiss to consider some of the grievances for which the committee ought to be prepared to prescribe a remedy. They are twofold, being those of the public and those of the profession, and have often been mentioned in these columns. Suitors have complained from time immemorial that men in leading practice habitually undertake more work than they can possibly do, and when a great man who has been engaged on their side fails to put in an appearance, are not slow to cast upon the whole profession the reproach of dishonesty. Of course the remedy for this is in the hands of the suitors, but they refuse to apply it, although there is no doubt that it would be effectual. On the other hand, it is much to be doubted whether a committee chosen from the ranks of the abused profession will make other than spasmodic and half-hearted efforts to effect a reform in this direction; and even supposing the efforts to be honest and continuous, the nature of the circumstances is such as to render their ultimate success more than doubtful. It is somewhat more consoling to be able to reflect that any such reform would certainly be in the interests of the younger members of the profession, upon whom the committee cannot bestow too much attention. Their position is indeed pitiable. With the utmost difficulty do they obtain work, and for that which first comes into their hands they are frequently ill-paid, and occasionally not paid at all. The law prevents them from recovering their fees, etiquette prevents the better sort among them from making open efforts to secure business, while the few who are unscrupulous flourish exceedingly. Such, indeed, is the condition of things in the present day, that many of the old school of barristers are ready to confess that a question has arisen whether the old rules and the ancient etiquette are to be strictly enforced or abolished altogether. At present they are in unconfessed abeyance, and their fate will depend in a great measure upon the action of the Bar Committee. A satisfactory answer to the question will justify the existence of the latter.”

VACATION ARRANGEMENTS.

Box-days.—The Lords have appointed THURSDAY the 16th August, and THURSDAY the 13th September, to be the box-days in the ensuing Vacation.

The Lord Ordinary on the Bills will sit in Court on WEDNESDAY, 22nd August, and WEDNESDAY, 19th September, at eleven o'clock, for the disposal of motions and other business falling under the 93rd section of “The Court of Session Act, 1868.” Rolls will be taken up on MONDAY the 20th August, and MONDAY the 17th September, between the hours of eleven and twelve.

AUTUMN CIRCUITS, 1883.

North.

Lord MONCREIFF (Lord JUSTICE-CLERK) and Lord DEAS.

Perth.—Tuesday, 28th August.

Dundee.—Thursday, 30th August.

Aberdeen.—Tuesday, 4th September.

Inverness.—Friday, 7th September.

RICHARD VARY CAMPBELL, Esq., Advocate-Depute.

HORACE SKEETE, Clerk.

West.

Lords YOUNG and CRAIGHILL.

Glasgow.—Tuesday, 21st August.

Inveraray.—Tuesday, 28th August.

Stirling.—Friday, 31st August, at eleven o'clock.

A. TAYLOR INNES, Esq., Advocate-Depute.

J. M. M'COSH, Clerk.

South.

Lords MURE and ADAM.

Ayr.—Tuesday, 4th September.

Dumfries.—Thursday, 6th September, at eleven o'clock.

Jedburgh.—Monday, 10th September, at twelve o'clock.

Æ. J. G. MACKAY, Esq., Advocate-Depute.

ÆNEAS MACBEAN, Clerk.

CALLS TO THE BAR.

The following gentlemen, having passed their Private and Public Examinations, were admitted members of the Faculty of Advocates on the 13th July:—Messrs. ALEX. STUART; JAS. A. FLEMING; J. P. GRANT, M.A. Edin.; R. STANSER M'NAIR, B.A. Cantab.; D. ROSS STEWART, M.A. Edin.; J. CAMPBELL SHAIRP, B.A. Oxon; A. J. M. MORRISON, M.A. Edin.; MARK DAVIDSON, M.A. Glas.; GEORGE P. M'NEILL, M.A. Edin.; and ARTHUR F. M. SCOTT.

The Scottish Law Magazine and Sheriff Court Reporter.

FORFAR SHERIFF COURT.

Sheriffs TRAYNER and ROBERTSON.

MURPHY v. MURPHY.

Husband and Wife—Jurisdiction—Aliment.—Ann Jane Kilpatrick or Murphy, presently residing in Perth, raised an action against her husband, Arthur Murphy, pawnbroker, Arbroath, concluding for (first) interim aliment at the rate of £8 per month until he should have provided her with suitable aliment, or until the rights of parties should be determined by a competent court; and (second) for delivery of her body

clothes, which her husband refused delivery of. The action was based upon several acts of cruelty alleged to have been committed by the defender upon the pursuer while living in family with him in Arbroath, and in consequence of which she was forced to leave her husband's house. These allegations were denied by the defender, who expressed his willingness to take his wife back to live with him, and he pleaded *inter alia* that the action was incompetent in the Sheriff Court. This plea the Sheriff-Substitute (Robertson) sustained, and dismissed the action, adding the following note:—

“Actions by a wife against a husband for interim aliment are sometimes competent in the Sheriff Court, and sometimes they are not. The Lord President explains the principle on which this rests in the case of M'Donald, 2 Rettie 705. It is shortly this, that the Sheriff must not touch upon any subject which properly belongs to the Consistorial Court. If the question of aliment really involves the question of separation, then it is not competent to go into it in the Sheriff Court; but if the spouses are *de facto* at the date of the action living separate; for instance, if the wife has long been deserted by her husband, as in Smith, 1 Rettie 1010; or if the parties are living apart under a mutual deed of arrangement, as in Hood, 9 M'Pherson 449,—then the question of interim aliment may fairly be raised in the inferior court, for the parties are *de facto* already separated, and the wife must live meantime until her rights are permanently settled in the Court of Session. The case of M'Donald, however, above quoted, is an instance where the action was incompetent. The spouses at the date of the action were living together, and the question whether the wife was entitled to interim aliment really involved the question whether she was entitled to a separation; and I think the present case is incompetent also. At the date of the action the parties were certainly living apart, but they had only done so for a few weeks. The wife says she left her husband's house owing to his cruelty, but on record he distinctly denies this cruelty, and wishes her to return. If I allow a proof, although it may be called a proof on the question of aliment only, it really is a proof on the question of separation, whether or not the wife is justified in living separate, or, in other words, whether or not she is entitled to a separation. It is the same proof that must be led in the Consistorial Court. I think this is trenching on a subject which properly belongs to the Supreme Court. A. R.”

Against this interlocutor the pursuer appealed to the Sheriff-Principal, who ordered a reclaiming petition and answers, and thereupon issued the following interlocutor and note sustaining the appeal, and remitting back to the Sheriff-Substitute to proceed with the cause:—

“*Edinburgh, 7th July 1883.*—The Sheriff, having considered the reclaiming petition and answers, Nos. 8 and 11 of Process, sustains the appeal, and recalls the interlocutor appealed against; closes the record; allows the pursuer a proof of her averments, and to the defender a conjunct probation; and remits to the Sheriff-Substitute to proceed with the case, reserving meantime all questions of expenses. JOHN TRAYNER.

“*Note.*—I differ from the Sheriff-Substitute as to the competency of the present action. Such actions are not unfrequent in the Sheriff Court, and their competency was expressly recognised in the case of Smith, to which the Sheriff-Substitute refers. The decision in the case of M'Donald, also

referred to by the Sheriff-Substitute, proceeded entirely upon the ground that the pursuer there had raised her action while she was still living with her husband. That is not so in the present case. The parties are *de facto* living separate, and were so before the action was raised. The case of M'Donald, therefore, affords no precedent. A wife, however, is not entitled even to interim aliment if her departure from her husband's house is unjustifiable. The pursuer must therefore prove the cruelty which she alleges in justification of her departure. She must also afford the Court some information as to the defender's means, in order that the Court may be able to fix the amount of aliment, if any, to which she is in the meantime entitled. The proof need not be very long, and should be taken at the earliest possible date. I thought at one time of ordaining the defender to deliver to pursuer the body clothes of herself and her child, but on further consideration I have deemed it enough to express my opinion that the pursuer is entitled to such clothes without pronouncing any decree, especially as the defender professes his willingness to deliver his wife's body clothes in his seventh plea. Should he, however, now decline to deliver these, I should, as at present advised, be disposed to listen favourably to any motion the pursuer might make for interim decree ordering such delivery. J. T."

Act. David Clarke—Alt. J. C. Anderson.

SHERIFF SMALL DEBT COURT OF LANARKSHIRE (GLASGOW).

Sheriffs CLARK and MAIR.

JOHN MACFARLANE v. THE GLASGOW CORPORATION GAS COMMISSIONERS.

Right to cut off supply of gas to dwelling-house of a partner of a firm in respect of which no gas rent was due, for an unpaid account for gas supplied to a different set of premises occupied by a firm of which he was at the time sole partner.—This was an action at the instance of John Macfarlane, 121 Hospital Street, Glasgow, against The Lord Provost, Magistrates, and Town Council of the city of Glasgow, as commissioners acting under the Glasgow Corporation Gas Act, 1869, and Acts explaining and amending the same, concluding for £12 for loss, injury, and damage sustained and to be sustained by the pursuer by and in consequence of the defenders or their servants, for whom they are responsible, having on or about 22nd January 1888 illegally and unwarrantably cut off the supply of gas to the pursuers' dwelling-house, situated at No. 121 Hospital Street aforesaid, and refused to put on the same, although requested to do so, notwithstanding that the pursuer has regularly paid the accounts for gas rendered, and is not due the defenders any sum for gas for said house, by which act the pursuer has sustained damage, and has been injured in his character, feelings, and reputation, to the extent of £12. The real question raised in this case was whether the defenders were entitled under their Acts to discontinue the supply of gas from the pursuer's dwelling-house, in respect of which no gas rent was due, for an unpaid account for gas supplied to a different set of premises, occupied by John Macfarlane & Co., of which

at the time the pursuer was the sole partner. The case was originally brought in the Small Debt Court, but from the importance of the question raised, it was remitted to the Ordinary Roll. The parties afterwards lodged a joint minute of admission, and after hearing the agents, Mr. Sheriff Mair pronounced the following interlocutor, finding the defenders liable to the pursuer in £6 of damage, and expenses :—

“ *Glasgow, 11th April 1883.*—Having heard procurators, and considered the whole cause: Finds (1) that the pursuer is tenant of a house at No. 121 Hospital Street, Glasgow, consisting of two rooms and a kitchen, where he has resided with his wife and his family since the term of Whitsunday 1882; (2) that the pursuer, on entering the said dwelling-house, was furnished by the defenders with the usual supply of gas for such a house, and this supply was regularly continued and regularly paid for down till 22nd January 1883; (3) that the firm of Messrs. John Macfarlane & Co., looking-glass manufacturers (of which firm the pursuer was or is the only partner), are, or were until recently, tenants or occupants of premises at No. 35 King Street, Tradeston, Glasgow; (4) that the said firm were also furnished by the defenders with a supply of gas, and this supply was regularly continued down till the time when the firm ceased to carry on business there, and the premises were closed, which was at some date between 15th November 1882 and 16th February 1883; (5) that the supply of gas for the premises in 35 King Street was regularly paid for till 27th April 1882, and that the account for the gas consumed therein by the said Messrs. John Macfarlane & Co. from 28th April to 15th November 1882 amounted to 16s. 11d.; (6) that the said firm having up till 22nd January 1883 failed or neglected to pay the said account of 16s. 11d. for the gas supplied to the premises in King Street, the defenders, after due notice to the said firm and to the pursuer, did, on or about 22nd January 1883, cut off and discontinue the supply of gas to the pursuer's dwelling-house in Hospital Street until said account should be paid, and that the defenders claim this right in virtue of the Glasgow Corporation Gas Act, 1869, the Glasgow Gas Light Companies Act, 1817, and the Gas Works Clauses Act, 1847; (7) that the pursuer on 2nd February 1883 paid to the defenders an account for 8s. 6d. for gas which had been consumed in his house from 2nd November 1882 till 16th January 1883, and which was rendered to the pursuer after the gas had been cut off from his dwelling-house; (8) that the defenders refuse to restore the gas to the pursuer's dwelling-house unless and until he pays the gas account for the business premises in King Street; (9) that the pursuer has raised the present action in the Small Debt Court, in which he claims from the defenders the sum of £12 for loss, injury, and damage sustained by him by and in consequence of the defenders having ‘illegally and unwarrantably cut off the supply of gas’ to his dwelling-house in Hospital Street, and still refusing to put on the same, ‘notwithstanding that the pursuer has regularly paid the accounts for gas rendered, and is not due the defenders any sum for gas for said house.’ Finds in law so standing the facts, (1) that the defenders, in virtue of their Acts of Parliament, are bound when required to furnish every owner or occupier of a building in Glasgow with a ‘supply of gas for such building, on condition that the owner or occupier, if required by the Corporation, give to them

at his own expense reasonable security for payment of the gas to be supplied;’ and that if any person fails to pay any gas rent, the Corporation may recover the same by proceedings at law, and may also discontinue the supply of gas; (2) that although there is not an express, there is an implied contract between the Gas Corporation on the one hand and the owners or occupiers of buildings on the other, that so long as the rent is regularly paid for the gas supplied to any particular building, the Corporation are bound to continue such supply thereto; (3) that in the present case there were two such contracts—one for the supply of gas to the pursuer’s dwelling-house in Hospital Street, and the other for the supply of gas to the business premises in King Street, occupied by Messrs. John Macfarlane & Co., of which firm he was the sole partner, and that such contracts must be dealt with as separate and independent contracts; (4) that as the gas for the pursuer’s dwelling-house was regularly paid for to the defenders prior to the 22nd January 1883, and he was not then due them anything for gas for said house, the defenders acted ‘illegally and unwarrantably’ in cutting off the supply of gas for said dwelling-house simply because the gas account for the business premises occupied by the pursuer, and situated elsewhere, had not been paid to the defenders. Finds therefore for the pursuer in the present action, and decerns against the defenders for the sum of £6 in name of damages, and finds the pursuer entitled to expenses, etc.

“WM. LUDOVIC MAIR.

“*Note.*—The findings in the above interlocutor disclose the question raised in the present case. It is simply this, whether the defenders, as the Gas Corporation of Glasgow, are entitled at their own hand to cut off the supply of gas from premises for which gas rent has been regularly paid, and for which none is due, simply because the gas rent for other premises occupied by the same party, and situated elsewhere, has not been paid? The defenders contend that by their Acts of Parliament they have such power, and also that they may, irrespective of the gas rent being paid or not, cut off the supply of gas from any building after giving due notice. Of course, if the Acts of Parliament give such a power, there is an end of the question. I am of opinion, however, that these Acts give them no such power. It must be kept in view that the defenders enjoy the monopoly of providing a supply of gas to the inhabitants of Glasgow. By the Glasgow Corporation Gas Act, 1869, it is provided (section 69) that the Corporation shall, ‘on the request of the owner or occupier of any building or part of a building within 50 feet of which any main of the Corporation is laid, furnish to such owner or occupier a supply of gas for such building, or part of a building.’ The obligation imposed on the Corporation to supply gas to any building is thus made absolute and imperative. By a sub-section of the same clause it is provided that the ‘owner or occupier making such request’ shall, ‘if required by the Corporation, give to them such reasonable security for payment of the gas to be supplied.’ The matter of security is one of discretion, and may or may not be insisted in; but if not insisted in by the Corporation, the gas nevertheless must be supplied. If, then, the obligation to supply gas is imperative, how can it be said that the Corporation have the power to cut off the supply, and that even although there has been no failure on the part of the consumer to pay

for the gas? The only clause in the Act giving the Corporation power to cut off the supply is the 69th. It is provided by that section that 'if any person *fails* to pay any gas rent,' etc., due to the Corporation, 'the Corporation may recover the same by proceedings in any Court of competent jurisdiction, and may also discontinue the supply of gas.' The defenders read this clause as giving them the power claimed in the present case. I cannot so read it. This section must, in my opinion, be read in connection with the one imposing the obligation on the Corporation to supply gas 'to the owner or occupier of any building or part of a building,' and when so read it is quite intelligible, and the meaning of it is plain. It just means this, that if any person fails to pay any gas rent for a building or part of a building, the Corporation may discontinue the supply of gas in such building. The effect of the two clauses in the Act is to create an implied contract between the Corporation on the one hand and the owners or occupiers of buildings on the other, whereby the Corporation are bound to supply gas to any particular building, and to continue the supply so long as the gas rent is paid. The supply for each building is a contract by itself. If, therefore, there be two separate buildings—the one altogether independent of the other—occupied by the same person, there must be two separate and independent contracts. A failure in the one does not necessarily involve a forfeiture of the other. It may be that the refusal or failure to pay the gas in the one might arise from some justifiable cause,—such as overcharge or bankruptcy,—and if so, it certainly would be extraordinary that the Corporation should have it in their power thereby to put an end summarily to the other, in the performance of which there had been no such failure. It might, besides, lead to extraordinary consequences. Suppose the case of a large factory (where several hundred people were employed) supplied with gas by the defenders. If the defenders' contention is sound they would have the power to stop the supply of gas in the factory, and thereby do irreparable damage, simply because the owner or occupier of it had failed—it may be justifiably—to pay for the gas supplied by the defenders to his dwelling-house. In the present case it is just the reverse. The failure was in the payment of the gas for the business premises, and for this failure the defenders discontinued the supply of gas in the pursuer's dwelling-house. No such power as that claimed by the defenders is to be found in the Act of 1869, and it certainly is not to be implied. The other Acts referred to by the defenders, and which are incorporated in the Act of 1869, do not give countenance to any such power. On the contrary, they show, in my opinion, that the power to discontinue or cut off the supply of gas is only given in relation to the particular building for which there has been a failure to pay the gas rent. I refer to section 18 of the Glasgow Gas Companies Act of 1817, and section 16 of the Gas Works Clauses Act of 1847. Holding therefore, as I do, that the defenders acted illegally and unwarrantably in cutting off the supply of gas from the pursuer's dwelling-house, I have found for the pursuer, and in the circumstances have assessed the damage at six pounds.

"W. L. M."

The case was appealed by the defenders to Sheriff Clark, who, after hearing the parties' agents, pronounced the following interlocutor, reversing the judgment of Sheriff Mair, and finding the Gas Commissioners entitled to expenses :—

*“Glasgow, 12th June 1883.—*Having heard parties’ procurators, and considered the cause: For the reasons assigned in the subjoined note recalls the interlocutor appealed against: Finds that the joint minute of admissions subscribed by the parties does not contain grounds relevant to support the conclusions of the summons, therefore assoilzies the defenders therefrom, and decerns: Finds them entitled to expenses; allows an account thereof to be given in, and remits the same when lodged to the auditor to tax and report, and remits to the Sheriff-Substitute to decern for said expenses when taxed.

F. W. CLARK.

*“Note.—*Assuming the facts admitted by the minute for the parties as the ground of the present claim of damage, it seems to me, after a careful consideration of the Acts of Parliament founded on, that no case for damage has been made out. The question really narrows itself to this: Are the defenders, when a party fails to make payment of his account to them for gas supplied in one set of premises occupied by him, entitled to cut off his supply of gas not only from premises in relation to which such default has been made, but from all premises occupied by the said defaulter, though situated in other parts of the city; or, as contended for by the pursuer, is the power of the defenders limited to cutting off gas in the particular premises in relation to which the default has been committed? Now, in deciding a matter of this kind, regard must be had to the statutory provisions; and if they are explicit, effect must be given to them, notwithstanding any seeming inconvenience or even hardship to which they may be supposed to give rise. The present Act, that of 1869, not only makes provisions as to this matter, but specially incorporates the 18th section of the previous Act of 1817, which in some respects is much more full and explicit. By that section it is provided as follows: ‘In case of default in payment of any such sum or sums of money so agreed to be paid as aforesaid’ (the sum payable for supply of gas), ‘it shall and may be lawful for the said company to cause the pipe or pipes belonging to the person or persons making such default, and communicating with any main or other pipe or pipes belonging to the said company, to be separated from the said pipe or pipes with which the same shall so communicate, and to cause the gas to be stopped from issuing or running into the dwelling-house or houses, manufactories, and public or private buildings of every person making such default.’ From this it seems to me quite clear that the defenders are, in terms of their contention, entitled not only to cut off the gas from the particular house or premises in relation to which default has been made, but from all other houses or premises occupied by the defaulter within the city. I am quite unable to read the aforesaid provision in any other sense. Now, the present Act of 1869 in no way derogates from the power hereby conferred. Not only does it specially incorporate the section, but by section 69 it repeats in a general way the same provisions, and somewhat extends them. It is as follows: ‘If any person fails to pay any gas rent, rate, damages, costs, expenses, or other sum due or recoverable by the Corporation under this Act, or any Act wholly or in part incorporated with this Act, the Corporation may recover the same by proceedings in any Court of competent jurisdiction, and may also discontinue the supply of gas.’ From this it seems plain that the defenders, in addition to the powers of enforcing payment by proceedings at common law, are also entitled to their old

privilege of compelling payment by cutting off the gas supply from the defaulter in all premises of which he has possession. By section 64 of the same Act the defenders are, as a further means of operating payment, empowered to demand reasonable security from all applicants for a supply of gas as a condition precedent to give them such supply at all. They have thus three statutory means of securing payment, the one without prejudice to the others; to wit, security in the first instance, legal procedure in the second, and the very significant compulsitor of refusing further supplies in the third. It being thus plain that the Legislature intended to confer the powers in question, it might be unnecessary to go into the matter as to the propriety or equity of such powers. Inasmuch, however, as the Sheriff-Substitute goes somewhat into this question, I would observe that, when properly considered, there is nothing remarkable in vesting the defenders with the compulsitor in question. It must be observed that the defenders have no monopoly. There is nothing to prevent the public from making gas for themselves, or obtaining gas from any other company dealing in that commodity. But if this be so, it seems to follow that the Legislature, in giving the defenders the right to refuse a supply of gas to those who make default in paying for it, is doing no more than arming them with the power which ordinary tradesmen possess at common law. No man is bound to deal with such of his customers as fail to pay their account. It is also plain but for their possessing a compulsitor of this kind the defenders would often find it difficult, if not impossible, to operate payment, frequently in the case of small sums. It is said that a consumer of gas might thus be compelled to make payment of an unjust claim under the penalty of having his whole premises, many of which might be situated in different parts of the city, left in darkness. But this seeming hardship is greatly minimised when it is considered that all he has to do is simply to consign under protest the amount claimed, or betake himself to the alternative of obtaining a supply of light in other ways. It is further said that the power in question might create difficulty in cases of bankruptcy. I fail to see any good ground for this suggestion; but it may be remarked that cases of bankruptcy are just instances where but for the possession of this power the defenders might be involved in great loss for which no adequate remedy could be obtained. On the whole, after full consideration of the matter, I am satisfied that the construction put on their Acts by the defenders is not only the plain meaning of these Acts, but is consonant with the equity and general welfare of the community. F. W. C."

Act. Wallace and Wilson—Alt. John Bowers.

Notes of English, American, and Colonial Cases.

COMPANY.—*Winding-up—Rent—Distress—Companies Act, 1862 (25 and 26 Vict. c. 89), s. 163.*—Where a company had taken possession under an agreement for a sub-lease, the superior landlord was allowed, after the commencement of a winding-up, to distrain on goods of the company, though he had taken from them a promissory note for the rent due to him.—*In re The Carriage Co-operative Supply Association; ex parte Clemence*, 52 L. J. Rep. Ch. 472.

THE JOURNAL OF JURISPRUDENCE.

THE INFLUENCE OF FRANCE ON SCOTTISH ECONOMICAL AND LEGAL IDEAS.

THE influence of France on Scottish life and character has never until recently been accurately analysed. Allusions to the subject were scattered through the pages of Robertson and Tytler: old Scottish words, traditions, and customs still survived. But while the light of special research was being cast on all the dark corners of history, while the ability and brutality of Rufus, the low cunning of John, the mysterious "Casket of Letters," and the tortuous policy of Buckingham and Charles in Madrid, were made the subject of exhaustive and painstaking criticism, not a single enthusiast came forward to estimate the character and extent of the international influences which must necessarily have followed in the train of the long political connection between France and Scotland.

The works of Dr. Hill Burton and M. Francisque Michel are illustrious exceptions to this general rule. With rare industry and equally rare analytical ability, they have penetrated into the archives of Scottish history, and made the dead past give up its dead. Customs that seemed to have been buried with our ancestors, words long since obsolete and forgotten, primitive ideas slowly deprived of their once absolute authority, fragments of early social and political relations, appear before us to prove or to illustrate their theories. What Sir Henry Maine did for the "village communities of the east and west," what Carlyle did for the character of Cromwell, what Professor Bain has done for the memory of Mill, Dr. Burton and M. Francisque Michel have done for Scottish archæology and philology. They have produced works which leave all competition far behind, works which deserve the high encomium pronounced upon his own masterpiece by the First Philosopher of History,—*κτῆμα ἐς αἰὶ μᾶλλον ἢ ἀγώνισμα ἐς τὸ παραχρῆμα.*

There are, however, two branches of this fruitful and entertaining subject which these able and ingenious writers have touched very slightly or not at all, viz. the influence of French ideas on Scottish political economy and on Scottish jurisprudence.

It may not be uninteresting, it will not surely be presumptuous, to map out a few of the most striking analogies, and to indicate the lines along and between which the Burtons and Francisque Michels of the future will have to work. Two distinct theories of French political economy exercised a marked influence on our own.

1. THE AGRICULTURAL SYSTEM.

2. LA PETITE CULTURE.

1. We may best examine the influence of the agricultural system on Scotland in the writings of Adam Smith.¹

The French Physiocrats or Economistes, with Quesnai at their head, attempted to discover the true source of wealth in land. Their arguments consisted of two premises, partially sound, and a conclusion totally unsound. The price of a manufactured article merely repaid in the long run its cost of production; the price of corn might be indefinitely increased by the assiduous cultivation of land, for nature, like India, when "tickled with a hoe," would "laugh in a harvest."² It seemed, therefore, to follow that the statesman should encourage agriculture at the expense of mercantile pursuits. The Physiocrats carried the principle of Free Trade "so far as to apply it to the whole relations of social life, and proposed to abolish all incorporations, crafts, faculties, apprenticeships, and restrictions of every kind, from those of medicine and theology downwards, and to let every man exercise any profession, set up any trade, or carry on any employment in any part of the city."³ In their central arguments, however, while there were, to use Bastiat's favourite expression, certain "facts which were seen," there were also certain other "facts which were not seen." Land only supplies the materials of wealth; the produce of land is limited by the law of diminishing return; commerce and agriculture are complementary and not contradictory.

Adam Smith supplied the points omitted in the reasoning of the Physiocrats by his vindication of the importance of labour; but he was not altogether free from the error which he exposed. The influence of the agricultural system upon his mind appears in his criticism of the mercantilists, in his definition of the aims of political economy, and in his perpetual recurrence to the natural, *i.e.* the primitive agricultural society.

But, while Adam Smith to a certain extent discarded the theories, he yet employed the philosophical methods of the Economistes. When he wrote, as at the present day, two fundamentally different methods of reasoning were before the world and

¹ Cliffe Leslie, *Essays*.

² Douglas Jerrold.

³ Alison, *Hist. of Europe*.

struggling for the mastery—the deductive and the inductive. Each has its own advantages and disadvantages. The former gives us clear ideas, enables us to grasp the subject-matter, and to reduce it within small compass. But it is open to one very serious objection, viz. that abstract principles are apt to degenerate into mere platitudes, or into a convenient excuse for begging the question. The latter is an invaluable test of accuracy, and a necessary corrective of error in our general principles, and brings a wide area of facts within our ken. But social phenomena are usually too complex to admit of its effective application, and too important to become the subject of the speculations and experiments of theorists. By the former method, political economy is treated as a body of natural, immutable, and permanent laws; by the latter, as “an assemblage of speculations and doctrines the result of particular history.” The French Economistes exclusively employed the deductive, while Montesquieu represented the inductive method. Adam Smith combined the two, and thus became “the parent of Ricardo in the former, and of Malthus and Mill in the latter direction.” The life of Adam Smith distinctly refutes Mr. Buckle’s assertion,¹ that the Scottish intellect in the eighteenth century was entirely dwarfed by clerical tyranny. He borrowed from Montesquieu the plan of interrogating nature, and the inductive system of reasoning. Doubtless Adam Smith’s inductions were often imperfect and inconclusive; he looked rather to the *number* than to the *quality* of the instances by which he proposed to support his principles; he placed the inductive books in the *Wealth of Nations*—the third and fourth—after the deductive—the first and second; he frequently deserved the reproof administered to him by Burke: “You, Dr. Smith, from your professorial chair, may send forth theories on freedom of commerce as if you were lecturing on pure mathematics, but legislators must proceed by slow degrees, impeded as they are by the friction of interest and the friction of prejudice.” But, in spite of these deficiencies, to the school of Montesquieu Adam Smith belonged; nor was he singular in his adherence to it. Lord Kaimes, in his lectures on the philosophy of law, followed a plan suggested “by the great French historian,” and “endeavoured to trace the progress of jurisprudence from the earliest to the most refined ages, and to point out the effects of the arts which contributed to subsistence, and to the accumulation of property in producing corresponding improvements in law and government.” Much of Dalrymple’s *Feudal Property* was revised “by the greatest genius of the age, President Montesquieu.”

Underneath the methods of Adam Smith lay the fundamental conception of the primitive state and law of nature, which exercised a most important influence on French philosophy and jurisprudence. In speaking of the law of nature I wish at the

¹ *History of Civilisation.*

² Leone Levi, *History of Commerce.*

outset to distinguish the accurate from what I take to be the inaccurate signification of the term. The law of nature as understood by the Physiocrats, and as criticized by Austin, Bentham, and Maine, is the ideal system of jurisprudence which was supposed to govern the actions and to control the very elementary relations of primitive society. Now this vague definition is something very different from the scientific use of the phrase in Germany on the one hand, and from its popular use in Scotland and England on the other. The *Naturrecht* of Professor Trendelenburg does not "confuse the past and the present,"¹ but looks for its realization into the future. It is a system, not of early institutions, whose historical verification is impossible, but of principles whose origin is in the nature of man, and whose sanction springs from the law of God. It does not mix up the *jus gentium* and the *jus naturale*, for it distinctly declines to be deduced from either.

The law of nature is equally opposed to "the finger of God working in human history," which sociology so loudly professes to discern." The growth of the conception of the law of nature in France has been traced with consummate ability by Sir Henry Maine. When the monarchy overthrew the aristocracy under the sovereigns of Valois Angouleme, the French lawyers were in an anomalous position; they themselves were acute, high-spirited men, commanding respect by their virtue, their learning, and their power. But "a dissonant view of the nature and province of jurisprudence" divided France into two great regions—"Le pays de droit écrit," i.e. of pure Roman law, and "le pays de droit coutumier," i.e. of Roman law in so far as it accorded with local customs. Thus the principles and the practice of the French lawyers were at variance. Their speculations were always ingenious, and often profound; but their actual professional conduct, proceeding on the assumption that the defects of French law were incurable, was a strenuous and consistent opposition to all reforms. The law of nature enabled them to reconcile these contradictory elements, professing as it did unbounded regard for symmetry and order, and yet committing its adherents to no definite lines of action. Montesquieu's *Esprit de Lois*, a work proceeding on the historical method, might have counteracted the absurdities of the law and state of nature but for the fact that, before its publication, the contagion had spread from the tribe to the forum in the popular writings of Rousseau. Shallow, irresolute, and immoral, Rousseau yet exercised a tremendous influence upon his age and country by a clear, lucid style that rises without apparent effort to the most passionate eloquence, by an intense sympathy with the wrongs and sorrows of the race—a restless humanity which never slumbered save "when Christians were tortured or women ravished," and by the absurd importance which he always assigns

¹ Maine, *Ancient Law*.

² Schlegel, *Philosophy of History*, p. 310.

to the dignity and character of the ideal primitive man. The German jurist seeks the realization of his dreams in the future; the Roman civilian searches for the fragments of the divine code in existing institutions; but Rousseau's admiration goes backward to the past, to the golden age "when wild in woods the noble savage ran," or to the halcyon days of moral and intellectual progress, when his hero stands as the centre of an original social compact, which probably never existed, and would not have constituted positive law even though it had.

From the teaching of Rousseau and his followers there was only one logical and inevitable conclusion, viz. that the object of all legislation and of all public and private philanthropy must be the restoration of the state of nature. The French philosophers proposed to reach this desirable consummation in two ways, by the abnegation of religious beliefs and moral restraints, and by the doctrine of human innocence and social perfectibility. The love of God, the sense of responsibility, and the dread of future punishment were forms more or less gross of craven superstition, devised by the cunning imagination of priests, and imposed upon the ignorance of fools. Any attempt to rein in passion was a violation of the dictates of nature, and nature was God. Sensuality, intemperance, and Atheism were merely theological misnomers for happiness, good living, and freedom of thought.

While Voltaire thus shook off from "the natural man" the fetters of religion and morality, Rousseau applied the same principle to social government, and inculcated the great lesson of the fundamental equality of all mankind, not an equality before the law, but an absolute *de facto* equality of rights, of duties, and of powers. "La propriété c'est le vol."

Since the character of man was so elevated and virtuous, and since all men were actually equal, it followed that the race could reach the goal of human perfection by its own unaided efforts, and that the only obligation which Government owed to human beings was—to let them alone.

Such, in brief outline, was the history of the law of nature in France. Of all the foolish dreams of the French Revolution, this conception of a law and state of nature alone haunted and influenced the mind of Adam Smith. He had spent some time in France; he was the intimate friend of the unfortunate Duke of Rochefoucauld, who wished to translate *The Theory of Moral Sentiments* into French; of Quesnai, who advocated the exclusive cultivation of land; and of Gournay, who enunciated the famous maxim: "laissez faire et passer." He derived from Turgot many of his illustrations, and several of his principles of taxation. He spoke of Quesnai's views as "the nearest approach to the truth published on the subject of political economy." When such were the historical surroundings of Adam Smith, we might *à priori* expect to find the methods and opinions of his distinguished con-

temporaries strongly characterizing his own. In fact, he always examined, in the first place, what he took to be the normal condition of things, and then proceeded in the second place to show how it had been altered by the folly and ignorance of prejudiced men. Thus the theories of the agriculturists and the mercantilists were the disturbing elements which had interrupted the harmonious relations between the country and the town, while monopolies and protective or prohibitory duties were the disadvantages which handicapped the exertions of the natural man. At the end of the fourth book of the *Wealth of Nations*, he tells us that "when all systems of preference or restraint have been taken away, the obvious and simple system of natural liberty establishes itself of its own accord." The *raison d'être* of these assertions is very apparent. Adam Smith saw everywhere in Europe the evils of governmental interference, and he accepted the mysterious state of nature as his ideal, and freedom of individual effort as the sole criterion of right or wrong in legislation.

2. "La Petite Culture" is a deduction from the law of nature. The present condition of society according to that system is merely a series of abnormal phenomena, produced and maintained by certain disturbing causes which it is the business of the legislator to remove. He must reduce, so far as in him lies, the inequalities of property, and consult in all his measures the greatest happiness of the greatest number. But the Physiocrats had taught that agricultural was the most desirable life for a people to pursue, and that land was the only source of wealth worthy of the name. From this it followed that the greatest number whose greatest happiness should ever be considered was the rural population. The theory of "La Petite Culture" has at least the merit of simplicity. Land cannot, it teaches, be permanently alienated from its original possessors the people. It may indeed, like any other commodity, be bought, exchanged, or sold, divided or subdivided, but all must be done with a constant reference to the principle of general utility. The possession of land is a trust which its proprietor enjoys only so long as he uses it well, and when he ceases to do so, "the talent is taken from him and given to another." The *vox populi* here as elsewhere is the *vox Dei*! In this primary position, which cannot in the main be successfully assailed, two complementary schools of French political economists professed to find support for their peculiar doctrines,—the extreme and moderate communists, and the advocates of peasant proprietorship. If the original and inalienable possession of land rests in the people, it surely follows that there ought to be an equal or proportionate division of land, so that all may have some share in what ultimately belongs to all. On the other hand, if the many are content to delegate their rights to the few, it is obvious that the few must be responsible to the many for the

execution of the trust, which those who have the power to confer must equally have the power to take away. On these arguments, Socialism in every form, St. Simonism and Fourierism, and the right of the people to effect an economical revolution, must finally rest. The advocates of peasant proprietorship did not go quite so far. They remembered that the so-called lessons of political economy are only incidental, and that the distinctive functions of the science are not didactic. Accordingly their assertions merely came to this, that wherever the experiment can be tried, fairly and without prejudice to existing rights, the people would be happier under a system of peasant proprietorship than of large estates. Each of these conceptions, in origin and character distinctly French, exercised a great influence on the mind of John Stuart Mill. In the opening chapters of the second book of his *Principles*, Mill states the condition on which alone private property can be justified, brings out the distinction between land and every other commodity, and concludes with the famous sentence so easily misquoted and misapplied: "The community has too much at stake in the cultivation of the land, and in the conditions annexed to the occupancy of it, to leave these things to the discretion of a class of persons called landlords, when they have shown themselves unfit for the trust." Mill is also decidedly favourable to Communism;¹ disposes successively of the arguments that its practical realization would be impossible and its social tendencies injurious, and boldly advocates the superiority of peasant proprietorship.

The laws of marriage, of evidence, of bankruptcy, of guardianship, and of contracts in France and Scotland are imported directly from Rome. A few illustrations may suffice.² Legitimation "*per subsequens matrimonium*" was admitted by Justinian, and its privileges were conferred on bastards by the decretals of Gregory. A similar extension of family rights was proposed to the English Parliament and proudly rejected (20 Hen. III. 9) in the famous watchword of Conservatism ever since: "*quod nolunt leges Angliæ mutari, quæ usitatae sunt et approbatæ.*" Scottish and French law, on the other hand, followed in the footsteps of Justinian.

Again, in France and Scotland, when all other proof had failed (*ubi deficit non jus sed probatio*), "reference to an oath" is permitted to the litigant; and any party whose goods have been destroyed is allowed to take an oath as to their value.

By the French commercial code, persons under seventy years of age may be imprisoned for debt, if the sum exceeds 200 francs, or £8. In Scotland, until quite recently, the same regulation existed in the case of debts above £8, 6s. 8d. There is a close affinity between French and Scottish legal terminology. The English "mayor" is the Scotch "provost," derived from the French.

¹ *Prin. of Pol. Econ.* book ii.

² Mackenzie's *Roman Law*, p. 321, etc.

“prevost,” the alderman becomes a “bailie,” the “agent” a “procurator” (procureur), and the “barrister” an “advocate.”¹

One further illustration of the contrast between the legal ideas of France and Scotland may be given. A bankrupt might satisfy his creditors by a complete *cessio bonorum*, or surrender of his property into the hands of a trustee who should administer it for their benefit. Now, both in Scotland and France, such a discharged debtor wore a bonnet as the badge that he was under the protection of the law. In the former this was called the “dyvour’s cap” and was yellow; in the latter it was green, “the bonnet vert.”

We find the influence of French upon Scottish law in our adoption of several judiciary arrangements peculiarly French.

(a) *The institution of a Public Prosecutor.* This peculiarity in our criminal jurisprudence is based on the principle, that “crimes are more effectually prevented by the certainty than by the severity of punishment.” The value of this official appointment consists in the fact that the prosecutor is one whom neither corruption nor intimidation can deter from the performance of his duty, who has no awkward stories or circumstances to conceal, and who is uninfluenced by any motive to hush up or exaggerate a criminal charge.

(b) *The College of Justice* was founded in 1552, and is a model of the old Parlement of Paris. The Scotch Estates which preceded the establishment of the Court of Session, closely resembled the States-General of France. In both, the three orders sat and voted together, while in England the baronage gradually drifted away from their connection with the lords, and allied themselves to the commons. In both, committees had been occasionally, then periodically, appointed to try certain civil cases, or to report on matters of sanitary or municipal interest; in both, the former functions superseded the latter, the reporting ceased, and the absolute exercise of the delegated powers continued; in both, the committees became permanent, while the assemblies which created them passed away; it was history repeating the episode of the “Comitia Tributa,” and the “Quæstiones Perpetuæ” in modern times. The committee of the Three Estates in Scotland became the College of Senators. The “Parlement” of Paris usurped the functions, executive, judicial, and legislative, of the States-General, and, to use Carlyle’s magnificent metaphor, set the great rusty wheel of latent popular power into that terrific motion which tore the little well-oiled wheels of aristocracy and royalty asunder, and dashed the machine of the constitution in pieces.

A. WOOD RENTON.

A SUCCESSFUL LITIGATION.

I MET a friend from the country the other day in Princes Street. He told me that he had just been settling up with his lawyers, and

¹ Lorimer, *Handbook of Scots Law*.

as he appeared to be in rather an excited state, I invited him into the club, and asked him what he would have to drink. By and by, under the mellowing influence of "the wine of the country," he calmed down considerably, and was able to impart the story of his wrongs to my sympathetic ear. His story was somewhat as follows :—

It happened in this way. About a year ago, Judkins, a pettifogging local solicitor, raised an action against me for £3000 as damages for injuries which, as he alleged, were sustained by him through my careless driving. The fact was, however, that it was rather I who ought to have had an action for damages against Judkins, for, as he was driving home one night from a will-reading, quite tipsy, he overtook my dog-cart, ran into it, and smashed both it and his own gig, and was himself thrown violently out against a stone wall. Well, I had always disliked the idea of going to law, and indeed many a time I have remarked that I would rather pay up a good deal than be obliged to go to the court; but, of course, a claim like this of Judkins' was not to be entertained for one moment. I had no alternative, then, but to fight it out to the last. Now I happened to know that Messrs. A. B. & C., W.S., was one of the ablest and most respectable firms of lawyers in Edinburgh, and accordingly I determined to put my case in their hands. At the outset I warned them that I was not a rich man, and that I did not desire to incur any unnecessary expense in connection with the case. At the same time, I assured them that the pursuer's claim was a thoroughly trumped up one, and desired them to do all that they might consider necessary to resist it. Well, all went on smoothly for some time, until at last one day I received, to my great satisfaction, a letter from Messrs. A. B. & C., to the effect that some technical point about the relevancy of the case had been decided in my favour, but that possibly the other side might reclaim against that judgment. After this all was quiet for some months, and I had almost begun to hope that the action had died a natural death, when one day I was painfully surprised to receive intimation from Messrs. A. B. & C. that they regretted to inform me that the Inner House had recalled the Lord Ordinary's interlocutor, and given expenses against me since the date of the same. This staggered me a good deal. Of the legal merits of the point decided, I did not profess to be able to judge, and indeed I had no reason to believe the Court to be wrong, but nevertheless I was at a loss to understand how I had done anything that justified them in saddling me with expenses. These expenses, as I learned on inquiry, would amount to about £25 on each side, in all £50, which I must pay out of my hard-won earnings, for no reason that I could understand except that *Judkins had got drunk, and driven his gig into my dog-cart!* Well, the case proceeded, and in less than a month much the same thing happened again. This time it was

about issues, and it differed in this respect from the former incident, that in this case it was I, or rather it was Messrs. A. B. & C., who took the matter to the Inner House. They told me that they were dissatisfied with the issues as adjusted by the Lord Ordinary. I replied that I left the matter entirely in their own hands, as I was not competent to form an opinion upon the question. The affair seemed to give the Inner House some trouble, for they took ten days to make up their minds upon it, but in the end the result was the same as on the former occasion. Again I lost. Again I was found liable in expenses. This fall cost me £30. Thirty pounds of my poor children's pittance gone to atone for Judkins' drunken folly!

The issues, however, had been adjusted, and so the case went on. By and by I had a communication from Messrs. A. B. & C. requesting me to come to Edinburgh to consult with them about medical evidence. I went to Edinburgh to remonstrate. "Medical evidence, we want no medical evidence. The man was drunk, and the whole thing was due to his own fault. What difference then does it make to me whether he sprained his little finger or cracked his skull?" Messrs. A. B. & C. assured me that they hoped the case would so come out in evidence, but the matter was not unattended with doubt and difficulty; moreover, they had no doubt that the statement of injuries by the pursuer was grossly exaggerated, and on the whole they thought it would be prudent to have medical advice. Well, of course I felt that I was in better and more experienced hands than my own, and I could only consent to what was proposed, so Dr. P. and Dr. E., two of the first medical men in Edinburgh, were employed in my behalf. The question of counsel was next broached. "Of course you would desire to have the best counsel, Dr. T." "Certainly," I replied, "my reputation and my fortune are both at stake in the case, so instruct the best counsel available."

The trial came on, Judkins lied by the yard, and so did a number of his witnesses, but they all came very badly out of it in cross-examination. No fewer than four medical men were examined on behalf of the pursuer, and the picture which they drew of the sufferings of the victim was such that, had I not been favoured with a sight of the precognitions of Messrs. P. & E., I should really have been disposed to pity the man, and to wonder that he was still alive. The morning of the third day of the trial was reached before we opened for the defence, and by two o'clock that day—long before our medical evidence was reached—the case was over, the jury having intimated that they did not desire to hear any further evidence, and returned a unanimous verdict for the defender. That evening I returned home in a delirium of delight. My wife and children, the local brass band, and three-fourths of the population of the place, received me at the station. Judkins was burned in effigy in front of the Royal Hotel that

same evening. "Well, well, my dear," said I to my wife, as I turned in that night, "let us bury the case in the past; victory is sweet, no doubt, but let us not forget that the business has cost me £80, and so for the future let us try to shun the law."

Well, I did try to bury the case. I bore my victory magnanimously; I rebuked my daughter for speaking slightly of Miss Judkins' toilette; I put a pound in the plate next Sunday, and I tried to think no more about the matter.

But the case would not be buried. Just three months later it rose again in the shape of a letter from Messrs. A. B. & C. which spoilt my breakfast for that morning, and for many a morning to come. That letter enclosed an account bringing out, in addition to the £80 I knew I would have to pay, a balance against me of £326, 3s. My expenses against Judkins had been taxed at £297. I was beside myself. I denounced Messrs. A. B. & C. as I had never denounced even Judkins, and I took the first train to Edinburgh.

On examining the accounts at the office of Messrs. A. B. & C., I found that the items in which I was mulcted might be reduced roughly to the following heads:—

Counsels' fees and their clerks', taxed off by the			
Auditor,	£42	7	0
Do., not stated to Auditor,	72	9	0
Engineer's fees, taxed off by Auditor,	15	15	0
Fees of Medical Men not called, taxed off by Auditor,	105	0	0
Fees for precognosing Witnesses in country, taxed off			
by Auditor,	27	2	6
Miscellaneous fees taxed off,	26	5	6
Do., not stated to Auditor,	37	4	0
	<hr/>	<hr/>	<hr/>
	£326	3	0

On every point Messrs. A. B. & C. were ready with explanations. In the first place, in regard to the items not stated to the auditor, I was satisfied at once that I had them there.

"Does not the very fact that you now propose to saddle me with charges which you had not the face even to state to the auditor prove conclusively that your charges are monstrous?"

"Not at all," was the reply, "it is clearly recognised by the profession that it is quite impossible to conduct a litigation with satisfaction upon the bare charges allowed by the auditor. Indeed, the auditor himself practically admits that, for whilst we would certainly have stated these items had we presented our accounts for taxation as between agent and client, the auditor would just as certainly have allowed them, indeed we are ready to submit the accounts for taxation now, if you desire it."

Next, in regard to counsel's fees. Why had they sent to counsel fees which were obviously in the opinion of the auditor absurdly extravagant?

"Dr. T.," was the reply, "you are aware that this case was one of great importance and very considerable difficulty, requiring the undivided attention of an experienced senior counsel, and indeed, if we recollect right, you yourself directed us to instruct the best counsel we could get. Now Mr. U. and Mr. V. were both in London, Mr. W. was retained on the other side; Mr. X. and Mr. Y. were both full of engagements that week; we were shut up, therefore, to Mr. Z., and we found that we could not get Mr. Z.'s undivided attention under 40 guineas a day."

Then again it was explained to me that the auditor had disallowed the expenses of the medical witnesses because they had not been called, and their evidence had not proved necessary for the determination of the cause.

"And didn't I tell you it wouldn't be necessary?"

"Well, you certainly expressed that opinion, but we thought we had convinced you that it would be prudent to have medical advice. Besides, we consulted Mr. Z., and he entirely agreed with us that it would not be safe to dispense with medical evidence."

And so on. On every point they were too many for me; but I felt all the time that this was not because they had treated me fairly, but because I had not the technical information which would have enabled me to reply to them. I have, however, a friend D., an S.S.C. I confess that I had a certain feeling of delicacy in approaching him, as I had passed him over with the case (the result, I fear, of a weak desire to tell all the people of our district that my case was "in the hands of Messrs. A. B. C., the duke's agents, you know"). But I had no help for it, so to D. I went, and handed over the papers to him. He promised to look into them, and to let me hear his opinion in a day or two. Well, yesterday I had a note from him to the effect that he had gone very carefully over the accounts, and that he had found them certainly fully, but not unfairly charged. That settled the matter, and to-day I have been in settling with Messrs. A. B. & C., for which purpose I have had to sell some stock I had meant to settle upon my wife. I can't complain that A. B. & C. behaved badly in the end; indeed, they took £30 off their account, which, as they pointed out, amounted to more than 25 per cent. of their own charges. D., too, behaved like a trump, and would take nothing for his trouble. But take it at best, I have had to pay—

Expenses in Inner House,	.	.	.	.	.	£80
Extra-judicial expenses,	.	.	.	.	.	296
Personal and travelling expenses,	.	.	.	.	.	23
In all,						£399

And why? *Because Judkins got drunk, and drove his gig into my dog-cart!*

I am not an unreasonable, discontented man. I can put up with ill-luck. I bore the loss of my fortune, through the failure

of my brother for whom I had become security, without a murmur. Even in a case of this kind I know that I might have a verdict against me, and be let in for damages where I was not really at fault, or might have to fight the action against a man of straw. These misfortunes I could bear. I know that they are the luck of life. But what I do complain of is, that in a case in which I am conclusively found by the Court to have been in the right against an adversary who is ten times better off than I am, I should be *finéd* in an amount nearly equal to my year's income. Perhaps the hardest thing about the whole business, too, is this, that there is really no one upon whom I can lay the blame of the loss, for D. assures me that A. B. & C. have behaved quite honourably and with sound judgment in the conduct of the case. It's your system, sir, it's your system that is to blame.

Such was the story of my aggrieved friend, and as he was deep in his third tumbler before he had done, I thought it time to make a move, so, having reminded him that his train would start in a very few minutes, I bade him good-bye, and went home to write that article upon "the system" here found so sadly at fault, which will appear in a subsequent number of this journal.

--- SHIPSHOD LEGISLATION.

WHEN in looking over the reports we come upon cases where the terms of a statute have to be considered, we cannot fail to be struck with the constant complaints made by the judges as to the manner in which Acts of Parliament are drawn. In the most recent case we have noted turning upon the construction of a statute, the case of *Nottage v. Jackson*, decided by the Court of Appeal in England just before the rising of the courts for the long vacation, the Master of the Rolls remarked that he had great difficulty in construing the Act before him, "because people who drew Acts of Parliament would use language which nobody else ever used;" and in regard to one question suggested by an expression in the Act, his Lordship wondered "whether the gentleman who drew the Act had ever cleared his mind on the subject." The late Master of the Rolls was as little complimentary as the present. Thus in the case of *Spencer v. Metropolitan Board of Works*, L. R. 22, Ch. D. 162, his Lordship observed: "I must say that whoever is responsible for the drafting of these clauses in this Act of Parliament has taken a great deal of trouble to raise a very difficult question, when he might with the greatest ease, by using appropriate and well-known terms, have avoided any question whatever. . . . Instead of this he has used a term which, having before me the judgment of Mr. Justice Chitty, and knowing the opinion of one of the Lords Justices upon the subject, I cannot

but admit to be one of very great doubt and difficulty." The carelessness of expression and the inadequate acquaintance with the subject-matter of legislation habitually displayed in the framing of Acts of Parliament, have recently been signally illustrated by the occurrence in one week of two cases regarding the construction of two very recent Acts of Parliament, the one in the House of Lords and the other before a court of seven judges of the Court of Session, where there would have been no question at all if the Acts had been framed with ordinary care and skill. The Acts which have given rise to these litigations are the Married Women's Property (Scotland) Act, 1881, and the Debtors' (Scotland) Act, 1880, productions which have issued from the establishment for the manufacture of shoddy legislation belonging to Messrs. Cameron and Anderson, the members for Glasgow.

The Married Women's Property Act, in extending the rights of married women, makes, as is just and reasonable, a distinction between marriages contracted after and those contracted before the passing of the Act. In the former case, the *jus mariti* is excluded from the wife's whole moveable estate (section 1). In the latter case, the Act provides, (1) that the provisions of the Act shall not apply where the husband has by an irrevocable deed made a reasonable provision for the wife in case of her surviving him, and (2) that "in other cases the provisions of this Act shall not apply," except that the *jus mariti* and right of administration shall be excluded from the wife's moveable estate acquired after the passing of the Act. In short, the wife has right to her whole moveable estate in marriages contracted after the Act and only to moveable estate acquired after the passing of the Act in marriages contracted before the Act. But while the proposals of the measure were under consideration, it was thought that if a separation of the estates of the husband and the wife was to be made, it was but right that he and the children should have a share in her separate estate, corresponding to what she and the children have in the husband's moveable estate on his predecease. Accordingly, sections 6 and 7 were passed to give effect to this, which was really an afterthought. That it was not intended by the measure as originally devised, appears clear from the preamble, which has been allowed to remain unaltered. The preamble says, "It is just and expedient to protect . . . the property of married women in Scotland." A provision as to the succession to a wife's property is not a provision for the protection of her property. In the case which came before the House of Lords, *Poe v. Paterson*, July 16, the question was whether the provision of section 6 (and the same question would arise as to section 7), which gives the husband a share in the separate moveable estate of his predeceasing wife, applies in the case of marriages contracted before the passing of the Act. These sections are expressed absolutely, and no distinction is drawn between marriages con-

tracted after and those contracted before the passing of the Act. Nor is there any reason why such a distinction should be made. If it is right that a surviving husband should have a share in the larger separate estate of his wife created by the Act in the case of marriages after the Act, it is right that he should have a share in the smaller moveable estate of the wife created by the Act in the case of marriages before the Act. But unfortunately the third section says in absolute terms, that in the case of marriages contracted before the Act, "the provisions of the Act" shall not apply, except so far as regards the exclusion of the *jus mariti*. If instead of the expression, "the provisions of this Act," the expression, "the foregoing provisions of this Act" had been used, no difficulty would have arisen. But the expression was not used, and so the question did arise, and out of it a litigation which has gone as far as it could go, to the House of Lords. Lord Fraser held that as the words in the third section, "the provisions of this Act shall not apply," are general and unqualified, the operation of section 6 was confined to the case of marriages contracted after the passing of the Act. The First Division reversed this decision, and the House of Lords has sustained this reversal, partly on account of the position in the Act of section 6, which follows the section in which the words of alleged limitation occur, but mainly because, if the provision of section 6 was limited as contended for, it would be an unreasonable provision. Lord Shand observed: "There can be no doubt, I think, that if the language of section 3 of this Act is to be taken literally, the defender would be entitled to prevail;" the defender's contention being that section 6 was limited by the words in section 3. The same view was taken in the House of Lords. Lord Blackburn said: "The whole thing depended upon the construction of a statute, not very carefully or skilfully drawn to express its meaning," and his Lordship thus stated the result of "the whole thing:"—"They were obliged to mould section 3 to carry out the obvious intention of the Legislature." When the courts say that they are obliged to depart from the literal meaning of the expressions employed in an Act of Parliament, and to "mould" these expressions in order to prevent absurd and anomalous consequences following from its provisions, they are pronouncing as grave a censure as can well be imagined upon the manner in which the Act has been framed. A measure ought not to pass into the hands of the public, impressed with the sanction of the Crown and the Parliament, in such a state as to compel the courts, in order to give it a sensible meaning, to strain their judicial powers to the utmost limit, and to exercise their functions of interpretation and construction in a manner which is dangerously akin to positive enactment.

This obvious slip in not correcting the expression in section 3 any more than the preamble, to meet the case of the later provisions of the section, which, as we have said, were no part of the original

scheme of the promoters of the measure, is by no means the only slip of the kind to be found in the Act. In section 1, sub-section 2, it is provided that "the wife shall not be entitled to assign the prospective income" of her separate moveable estate, "or, unless with the husband's consent, to dispose of such estate." If there is any meaning in language, this means that the wife may dispose of her separate moveable estate with her husband's consent, but even with her husband's consent she cannot dispose of the prospective income thereof. This, of course, is an absurd provision. The words "unless with her husband's consent" have got into the wrong place. Whether, if the question should actually arise, the Court would consider itself entitled to put them in the right place, and again to try its hand at "moulding" the expressions used by the Legislature, we do not know; but in this case the argument, such as it is, could not be made to do service, that the provisions, which do not suit each other if a literal reading is adopted, occur in different parts of the statute. Then what is meant by the word "dispose"? This is a very general expression, and refers, one would say, to *mortis causa* dispositions as well as dispositions *inter vivos*. If it does, then under this Act to extend the rights of married women, they cannot make a testament disposing of their separate moveable estate, without their husband's consent, while they could do so before the Act.

In the case of marriages contracted after the passing of the Act, the Act does not apply unless the husband was at the time of the marriage domiciled in Scotland. The provision to this effect was introduced during the progress of the measure through Parliament, because it was felt that it would be unfair to subject a man to the operation of a law different, or which might be different, from that under which he contracted. But why is the same provision not made in the case of marriages contracted before the passing of the Act?

The other Act, the construction of which was the matter in dispute, was the Debtors' (Scotland) Act of 1880. The case is the *Balerno Paper Mill Co. v. Mackenzie*, July 11, 1883, 20 Scot. Law Reporter 757. This Act did not fare so well as the other product of the manufactory whose trade-mark of hugger-mugger expression they both bear. What the general intention of the promoters of the measure was is well known, but unfortunately there was more than mere looseness and carelessness of expression to be got over in this case, and the provisions of the Act were beyond the reach of "moulding." The defender, who had been ordered to consign a large sum of money for which he was sued, failed to do so, and the Sheriff, in respect of his failure, gave decree for the sum. He appealed to the Second Division, who recalled the interlocutor granting decree, and of new ordered consignment; and, no doubt, the defender was gratified with his success so far. Having again failed to consign the money, the pursuer put him in prison. The

defender presented a note for suspension and liberation, founding on the Act abolishing imprisonment for debt. This Act has been found very handy by a number of enterprising gentlemen, but it cannot do everything. The question in the case was this, Is imprisonment competent on a decree for consignation? Five of the seven judges held that it is, and two that it is not. The 4th section of the Act says: "No person shall, after the commencement of this Act, be apprehended or imprisoned on account of any civil debt." This is the keynote of the Act. The Act further provides that "nothing contained in this Act shall affect or prevent the apprehension or imprisonment of any person under a warrant granted against him as being *in meditatione fugæ*, or under any decree or obligation *ad factum præstandum*." The decision of the majority of the Court was based on two grounds. First, the imprisonment in this case was not "on account of any civil debt." It is difficult to say what precisely is meant by the words "on account of." They are, as the Lord Justice-Clerk observed, too ambiguous to be employed in such an important matter. But it was thought clear that the expression "civil debt" must mean a debt constituted and decerned for. Here there was no debt, only a claim which might never be decided to be a debt. On this point the Lord President observed: "No debt is due or has ever been constituted against the suspender, and until such a decree of constitution was issued under the old law, no imprisonment for debt could follow. This, however, is a decree of a different kind altogether. It is not for payment of a sum of money on account of a debt, but it is an order to lodge the money in court until it is seen if any debt is due. It is quite possible that on an accounting between the parties, there may be no civil debt at all, or it might be that there was a debt due by the suspender of a different amount from that which he was ordered to consign." Secondly, the decree for consignation was a decree *ad factum præstandum*. It was a decree to do something, not to pay something. "A decree for consignation," said the Lord Justice-Clerk, "is in its essential nature a decree for deposition, not a decree for payment. That is its essential character, and in the present instance this decree has no other character. No doubt the thing to be deposited is numerate money, but that does not in my opinion render the obligation different in its incidents from that of placing in the hands of the Court a corporeal moveable, such as a picture or a statue, to await the orders of the Court." The reason for excepting decrees *ad factum præstandum* from the abolition of imprisonment generally is, that imprisonment is the only method of enforcing such decrees, and that reason applied here. It was impossible in a case like this to proceed against the property of the debtor, and so the only resource was to proceed against his person.

Lord Shand and Lord Craighill dissented from this view. Their view was as follows:—The statute is remedial in its nature, and its provisions ought to be interpreted as such statutes are

interpreted, so as to extend the remedy to the class of cases for which it was designed. Its clear purpose and design was to restrict the enforcement of pecuniary obligations of decrees for the payment of money to diligence against property, and to take away the power of enforcement by diligence against the person. Now, a decree for the consignation of money was in its essential nature a decree for the payment of money, and did not belong to the class of decrees *ad factum præstandum*. There was no sound distinction in the present case between a decree for payment in the ordinary sense and a decree for consignation, or any ground in reason why imprisonment should be competent where the decree is in the one form rather than in the other. In either case, money has to be paid. In the one case it must be paid to the creditor to whom it is found due. In the other, it must be paid into court, either because it has been found due, but is the subject of competition, or because on a *prima facie* view of accounts stated it appears that the amount is due, and it is reasonable in the view of the judge that it should be consigned. Equally in both cases the person required to pay may be unable to pay, or he may wilfully withhold money of which he is possessed, and there is no reason for allowing imprisonment in the one case and not in the other. On the other hand, a decree for consignation is not a decree *ad factum præstandum* in the true sense. Such a decree is an order to perform some act apart from the payment of money. We have stated at some length the different views on the case, because the case is now the law upon the subject. From it you find the law upon the subject which one might have a difficulty, and which, considering the difference of opinion upon the Bench, there was a difficulty in puzzling out of the statute.

The result of the provision of the statute, and we must take the provision of the statute to be that which the majority of the Court have held to be so, is this, that on a decree for debt, for the absolute payment of a debt, the creditor cannot imprison the debtor, but he can on a decree for consignation merely, for a conditional payment of the sum. And there is no remedy in this latter case to the debtor, such as he had in the case of a decree for debt under the law as it existed before 1880. A decree for consignation being a decree *ad factum præstandum*, the person against whom it is granted is not entitled to liberation on surrender of his goods. If decree had been given for the debt in this case, the debtor could not have been imprisoned at all. Under the decree that has actually been pronounced, it is quite possible to keep him in prison for life.

We have intimated that, considering the avowed intention of the promoters of the Debtors' Act, this result is not one which they anticipated. But the intention of the promoters is not to be considered except as it appears in the provisions of the Act. The present case differs from the case in the House of Lords regarding the Married Women's Property Act. Courts of law when they find the intention of the Legislature apparent in the provisions of

the Act may disregard inaccuracies of expression, and may exercise some art in "moulding" the language employed. But it is very different when you have an express provision to deal with. The Court must give effect to that. The provision as to decrees *ad factum præstandum* was at least in the view of the Court an express provision which could not be disregarded, no matter whether its results were or were not consonant with the views of those who had effected a change in the law. Considering their general views on the subject, it is clear enough that the result arrived at was not foreseen by the promoters of the change, and that the provisions of the Act were not framed to meet the case of an order for consignment, for the simple reason that the framer of the Act never thought anything about it. A general purpose to alter the law in a particular direction is well enough in its way, but one should not overlook the fact that the particular provisions of the Act intended to effect the change must be precise and distinct, and apt for the purpose. In order to make these so, it is necessary to have a tolerable acquaintance with the law upon the subject which is dealt with, and it is evident that this is a thing which the framer of the Act did not happen to possess. If the provisions of the Act as interpreted by this decision of the Court frustrate so far the intention of the author of the Act, it is easy for him to bring in a short Bill for its amendment. In an article in the May number of the *Nineteenth Century*, written in a spirit of beatific self-congratulation upon his efforts for the abolition of imprisonment for debt, and the alleged successful results of the abolition, Dr. Cameron informed the public that in three successive sessions he had passed three successive Acts upon the subject. The number of Bills one brings in upon a subject is, it appears, the test of the success of a legislator. A fourth session has been allowed to slip past without being utilized in this way. That opportunity has passed; everything comes to an end, even the parliamentary session of 1883. But a fifth is coming, and the Court has given the author of the Rogues' Protection Act an opportunity of adding another claim to *pose* in the attitude of a successful legislator by passing an Act to amend one which, to carry out the evident intention of its author, ought to have been differently drawn at first.

In the first of these cases on which we have commented it was thought that the purpose of the provisions was so clear that the slovenliness of expression might be disregarded; but this very clearness of intention makes it all the more inexcusable that terms were employed which, so far as they went, went in an opposite direction from the intention. In the other case, the intention of the provisions was so doubtful that out of eight judges (including the Lord Ordinary, whose judgment was reversed), five thought the Act meant a certain thing, and three thought it did not mean that, but meant the reverse.

DECISIONS UNDER THE EMPLOYERS' LIABILITY ACT.

(Continued from page 414.)

THE fifth sub-section of section 2 makes a new departure. Responsibility had been laid upon employers for the negligence of persons to whom they had delegated their authority. This sub-section imposes another ground of liability in the cases to which it applies, providing that the employer shall be responsible where the injury is caused "by reason of the negligence of any person in the service of the employer, who has the charge or control of any signal, points, locomotive engine, or train upon a railway." No doubt, persons having such charge or control have powers of direction entrusted to them which affect the safety of others just as much as if they had others subject to their orders or superintendence, and so were clothed with the authority of the employer, consequently their case is different from the case of one ordinary workman in relation to another. But powers of direction or control which affect the safety of others are possessed by a large class of persons for whose negligence the employer is not made responsible, such as enginemen at a coal pit. The only reason for a distinction being made in the case of persons employed in connection with railways, seems to lie in the greater frequency of the risks run in consequence of the powers of direction affecting the safety of persons in the employment. With reference to this sub-section, Mr. Justice Field says, in the case of *Gibbs v. Great Western Railway Co.*, afterwards to be more particularly referred to, "after having brought in any defect in the condition of the ways," etc., persons entrusted with any superintendence and persons entitled to give orders, "the Legislature brings in a class of persons having a smaller area of superintendence." It is incorrect to speak of what is pointed at in sub-section 5 as "superintendence." If it were, there would be no need of this sub-section. The third sub-section deals with "any superintendence;" and what can be a smaller area of superintendence than "any" superintendence? It is only in a very loose sense of the term that charge or control of points, for example, can be designated as superintendence of points. The term "superintendence" in the third sub-section is not used in a loose and general sense, and it means not supervision of points or plant, but superintendence over persons. If it included the looking after or superintending plant, for example, what, too, would be the use of the first sub-section, which imposes liability for the negligence of persons whose duty it is to see that the plant, etc., is in proper condition?

There are many questions suggested by this fifth sub-section. First of all, what class of fellow-servants are they whose negligence is to make the employer liable? It is quite well known that this clause was inserted in the bill in the interests of the servants of railway

companies. But if apt words are not used to confine the operation of the section to this class of cases, its operation cannot be so limited, whatever may have been the intention. The additional liability introduced by sub-section 5 not being one founded on any principle peculiar to a particular class of employees, any limit to the operation of the clause must be arbitrary, and must be found in the words of the clause. Does the clause then apply only to negligence of the servants of railway companies, and protect only the interests of the same class of servants? There is nothing in the sub-section limiting its operation to this extent. It merely says, "any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway." Not a word is said about a railway company. In support of the more limited view of the clause, it has been argued that the collocation of the words, "signals, points, locomotive engine, train," all point to the working of a railway by a railway company. This view has been negatived in the case of *Doughty v. Firbank*, L. R. 10, Q. B. D., and for the obvious reason that all these things may be employed in the working of a railway, whether it is or is not worked by a railway company. "It is argued that, taking into consideration the other words used in the sub-section, such as signal, points, train, the sub-section must be taken to refer only to a railway worked by a railway company under statutory powers, and subject to the regulations by which such railways are governed. I can see no reason for thus restricting the natural sense of the words. There are many railways used by colliery-owners and others upon which trains run, and there seems to be nothing in the words of the Act to limit its application to railways used by railway companies."—*Per Pollock, B.*

But supposing that the operation of the sub-section is not confined to the working of railways by railway companies, is it confined to the case of railway traffic, to the ordinary *working of railway trains*? It is said that it is, because of the collocation of the words "signals, points," etc., the same argument as was employed to show that the sub-section refers only to the case of railway companies. In one case Mr. Justice Mathew speaks of the charge or control being "for the purposes of traffic and movement." And in *Murphy v. Wilson*, 48 L. T. 788, Mr. Justice Lopez says: "We find the term locomotive engine associated with words which belong only to the working a railway." We think the operation of the clause is not limited as stated. Traffic and movement, the running of trains, in fine, the working a railway—that is an operation for which all these things mentioned in the sub-section, signals, points, locomotive engines, and trains, are necessary, but it does not follow from this that it is only operations for which the whole of these things are necessary that are contemplated by the provision. The words, "signal, points, locomotive engine, train," are disjunctive; and it is right that the expression should have been made as it is,

because the risks which are incurred are incurred in operations other than that in which the action of all these things are combined, viz. the forwarding of traffic. Take the case of a locomotive. The expression "locomotive engine" is conjoined with the expression "train" in the clause. Can it be said that because of this, that unless the locomotive engine itself is conjoined with a train, the clause does not apply? If a man is run over by a locomotive engine, surely his right to compensation does not depend on whether there was a train behind it or not. Yet this is what is in effect said by Mr. Justice Cave in the case of *Murphy v. Wilson*. One of the grounds taken in that case was that the machine in question could not correctly be described as a "locomotive engine" in the ordinary meaning of the term, a point we shall consider in treating in detail of the various things particularized in the clause. But the general ground was taken, that from the collocation of the words the clause referred only to the forwarding of traffic. It is rather singular that Mr. Justice Pollock took the view in this case, that the collocation of the words pointed to the ordinary working of a railway. "'Signal,' 'points,' are well-known things connected with the ordinary management of a railway, and 'locomotive engine' is also a well-known term for a well-known thing, and they altogether are connected with the ordinary working of a railway." Yet in *Doughty v. Firbank* his Lordship had held a railway made for the purpose of constructing railway works was a railway in the sense of the Act; and, in the passage already quoted, had repelled the inference from the collocation of the words "signal," "points," "locomotive engine," "train," "railway." This was to hold that the collocation of the words does not point to the ordinary working of a railway; for a railway used in the construction of railway works is not a railway on which there is any ordinary working of a railway. But surely the inference from the collocation of the words must be made when the meaning of the term "railway" is in dispute, as well as when the meaning of the term "locomotive engine" is in dispute.

In support of his view, that the clause had reference to the ordinary working of a railway merely, the forwarding of traffic, another and a singular reason was given by Mr. Justice Cave in *Murphy's* case. His Lordship referred to the mischief intended to be provided for by this clause. "I should like to advert to the law as it stood before the Act." Then his Lordship refers to the case of *Morgan v. Vale of Neath Ry. Co.*, L. R. 1, Q. B. 169. In that case it may be recollected a carpenter at work on a scaffolding was injured through the fault of a porter shifting an engine at a turn-table, but claim was barred because the two men were held to be fellow-servants. "This Act was intended to take out of the rule persons whose employment brings them into contact with the traffic of a line of railway, and with all the risks necessarily and naturally incident to it. It is said we must look at the words

'locomotive engine' in the sense that whenever we find a locomotive on rails we must hold it to be within the meaning of the section. Why is such a locomotive as this more dangerous to a servant or more likely to cause injury to him on a railway than on an ordinary road, or when stationary? One cannot see why the liability of masters should be extended to engines moving upon rails. But on looking into *Morgan v. Vale of Neath Ry. Co.*, we see that the risk mentioned there is not the risk of persons engaged in a common object merely, but in a common and not an immediate object, such as the forwarding of traffic of a railway. We must bear in mind this case in construing this section, and that leads us to look at it as making provision for the risk arising from the forwarding the traffic of a railway," and so on. Now the special note of the case of *Morgan v. Vale of Neath*, as is well known, is that it was an amplification of the doctrine of *collaborateur*, deciding that to put persons in the relation of fellow-servants it is not material that they should be engaged in a common employment for a common object; it is enough that they are in the same service. Even a better illustration is given in the case of *Tunney v. Midland Railway*, L. R. 1, C. P. 291, where a labourer employed by a railway company, carried to and from his work in the company's train, was held a fellow-servant of the guard of the train. But what has this circumstance of the person injured and the person through whose fault the accident occurred being servants of a railway company to do with the matter? This circumstance is a mere accident of the case, and has really no more to do with the decision than the circumstance that the one man was a carpenter and the other a porter. The principle might be exemplified in railway cases which have nothing to do with the forwarding of traffic, in cases like the one in which this opinion of Mr. Justice Cave was given, where the railway was used for the construction of works; and, indeed, in this very case of *Morgan v. Vale of Neath*, it was exemplified in a case which had very little to do with the forwarding of traffic. What had a carpenter working on a scaffolding and a porter shifting an engine on a turn-table to do with the forwarding of traffic? But, at any rate, the principle has been exemplified in many cases which have nothing to do with railways. Thus in *Lovell v. Howell*, L. R. 1, C. P. D. 161, where a waterman employed solely in mooring and unmooring the barges brought to his master's wharf to be loaded or unloaded, was injured while passing through the warehouse to receive his master's orders, by the negligent act of one of the men engaged in the warehouse, it was found he had no claim against the master, the waterman and the warehouseman being held to be fellow-servants. It is a singular method of reasoning to say that the sub-section which is concerned with railways should be limited to the effect of "making provision for the risk arising from the forwarding of traffic," because a doctrine which has a much larger scope than the case of railway

servants of any kind, engaged in forwarding traffic or not engaged in forwarding traffic, was enunciated in a case which happened to be about two people in the employment of a railway company. "There is a river in Monmouth, and there is a river in Macedon, and there is salmon in both."

So much for the general scope of sub-section 5. We come now to consider the import and effect of the expressions in the clause in detail. The persons whose negligence is to impose liability on the employer are persons in his service who have "the charge or control of" signals, etc. What is meant by having "charge or control"? Does this mean that the negligence must occur in the exercise of the charge or control? Clearly this is the meaning. There is no *rationale* in the provision otherwise. The only difficulty that presents itself against taking this view arises from the circumstance that in the sub-section regarding superintendence, it is expressly said that the negligence shall occur "in the exercise of such superintendence." This only shows the evil of adding superfluous words to a provision, the meaning of which is clear enough already. It suggests a doubt as to the import of some other provision, the meaning of which is clear enough to any person of ordinary intelligence, when similar superfluous words are not inserted.

A case upon the meaning of "charge or control" is *Gibbs v. Great Western Railway Co.*, 1883, 48 L. T. 640, R. 10, Q. B. D. 22. A man, whose duty it was to clean and oil the points, carelessly left the lid of the box covering the points upon a line of rails, in consequence of which the train left the line and the engine-driver was killed. There was an inspector, who sometimes every day, sometimes once a week, visited the points here and at other places along the line, to see that the men did their duty in cleaning and oiling the points. One would have thought that the company was not liable because the negligence was clearly apart from the charge or control of the points. The accident did not result from any negligence in regard to the points. The man left the lid of the box on the metals just as he might have left a lever, or a rail, or a bundle, or dropped a stone on them. The Court, however, say nothing whatever on this subject, probably because in the view they took as to whether the man had charge or control, this was unnecessary. The company was held not liable, and the ground taken was, that the man whose negligence caused the accident had not charge or control of the points. According to the view of Mr. Justice Matthew, the pointsman was the man who had charge or control of the points: "I find a difficulty in ascertaining what was precisely meant by the general language used in sub-section 5, but upon the best interpretation I can give, I think the Legislature had in contemplation the negligence of some person having charge or control of the points for the purposes of traffic and of movement. This man did not answer that description, but was merely employed to oil, clean, and adjust that which was moved by some other thing in the charge

and control of some other person." Charge and control are here understood to mean the same thing. Mr. Justice Field's view was, that even if the words "charge and control" meant different things, this man had not even the charge,—the inspector had. "Certainly there was a person in this case who had the 'control' of the points," viz. the signalman. "It is not suggested that the man whose negligence caused the accident had control over the points, but it is said that he had 'charge' of them. What is the meaning of a person having the 'charge or control' of the points? I doubt whether the words 'charge' and 'control' are intended to mean different things. If they are, and if the man in the signal-box was not the person in this case who had the charge and control of the points, possibly the inspector had charge, and the man in the signal-box had control. The position of the man who was in fault was this: It was the inspector's duty to see that the points were oiled, kept clean, and adjusted along a part of the line. He had several men under him of whom this was one, and each man had to visit and test several different sets of points, see that they were in working order, and clean, oil, and adjust them at proper times. Can it be said that the man who taps the wheels of the carriages when a train stops at a station, or puts grease into the boxes of the axles, has 'charge' of them? I doubt whether what this man did came to more than that. It is true that he could not oil and adjust the points without taking the lid off the box, and it may be that he would have had 'control' over the box, if the Legislature had thought fit to include the words 'box or other moveable article' in sub-section 5. That sub-section specifies signals, points, etc., and whilst clearly pointing to persons in the common employment of a railway company,—such as engine-drivers, firemen, gangers, [?] pointsmen,—provides that the common master shall be liable for the negligence of the particular persons who have charge, that is, who have the directing hand to carry out the general instructions of the master with respect to the specified things, and these only."

It seems to us that the circumstance of a man having an inspector over him, who visits once a week or so to see that he does his duty, does not prevent him having "charge." Indeed, if the question were, who had charge of oiling and adjusting the points, and it were thought that only one man could have charge, we should say that the man had charge whose duty it was to oil and adjust, not the inspector, who merely saw that the man did his duty—that is to say, properly attended to his "charge." As regards charge or control of points, we should say that this has reference to the purpose for which they are used, and consequently the man who has charge or control of them is the person who has the power of moving them. If the man whose duty was to clean and oil the points neglected this duty, and an accident happened in consequence, this would come under the category of "defect in the condition of the ways, works, machinery, or plant," caused by the negligence of the person

entrusted with the duty of seeing that these things were in proper condition (section 1, sub-section 1; section 2, sub-section 1). This view, of course, could not be taken by Mr. Justice Field, who, as mentioned in our former article, observed in *M'Giffin's* case that the want of oiling would not be a defect in the condition of machinery. A similar remark to the one we have made applies to the cases put of a man who taps the wheels of the carriages or puts grease in the axle-box.

What is a "locomotive engine"? In *Murphy v. Wilson*, 48 L. T. 788, this was the question to be considered.

In the work of widening an ordinary railway line a temporary railway had been laid down, and a steam crane used in lifting materials for the work was fixed on a trolley which ran on this temporary line of rails. The machine was so constructed that the engine served the double purpose of moving the machine along the rails from place to place, and of working the crane. When the machine was moving on, the wheel came in contact with the hand of a labourer, and injured it. The accident was caused by the fault of the man in charge of the machine in bringing it up without warning. The Court held that this machine was not a "locomotive engine." Besides the ground which we have already considered in reference to the meaning of the section generally, that from the collocation of the various words "signal," etc., what is intended by the sub-section is what is concerned in the ordinary working of railways, or "the forwarding of traffic upon a railway," which would require that the locomotive should be one intended to move railway trains, this other ground was taken, that the machine was not a locomotive engine. "When it was desirable to move the crane to another part of the works, that could be done without the assistance of an ordinary locomotive or a horse, by means of its own steam power, and so in that sense, and in that sense only, it was a locomotive engine. . . . The machine which it is contended is a locomotive is a steam crane used for the purpose of raising materials, and as an incident or accident attached to it is the power of moving itself from place to place by its own steam. This machine seems to me to have no connection with an ordinary locomotive" (*per* Pollock, B.). It seems to us that this hermaphrodite machine was both a crane and a locomotive. It did not cease to be a locomotive because it was also a crane.

"A chest contrived a double debt to pay,
A bed by night, a chest of drawers by day,"

is not the less a bed by night because it serves the purpose of being, or having the look of being, a chest of drawers by day. If the crane had been on a separate truck, and the engine had been used solely for the purposes of locomotion, surely this engine would have been a locomotive engine. What does it matter that the crane and the engine were both on one truck? Performing a

double function, and possessing a double character, when was the machine to be considered a crane and when a locomotive? Why, according to the purpose for which it was being used. When the engine was used for working the crane, the concern was a steam crane; when the engine was used for moving the machine from place to place along the line, it was a locomotive. How was the engine being used when the accident happened? The machine was being used in the latter capacity. It was moving along the line, when, through the negligence of the person having the charge or control of it, it came up and injured the plaintiff. If it had not been a locomotive, the accident would not have happened. No more conclusive proof could be given of its being a locomotive than this. The circumstance of the locomotive power being only an incident of the primary purpose of the machine, viz. for lifting materials, is of no importance. It was an incident causing a risk against which the clause was intended to provide, and which actually was incurred.

What is a "train"? The case of *Cox v. Great Western Railway Co.*, L. R. 3, Q. B. D. 106, is a decision upon this point, as also upon the meaning of the term "railway." At a goods station there were several lines of rails, at each end of which was a turn-table for shifting the trucks to move them up to a platform to be loaded or unloaded. This was done by means of a capstan at the turn-table, the motive power being supplied by a fixed hydraulic engine. A railway servant was moving a truck on a turn-table in order to attach it to twelve trucks coupled together in the usual way, which were on an adjoining line of rails. The capstan-man at the other turn-table negligently backed the twelve trucks, so that the plaintiff was injured. There was no locomotive attached to the trucks. These twelve trucks on this line of rails were held to be "a train upon a railway." Mr. Justice Matthew said: "Did the twelve trucks constitute a train? It seems to me that they did. A train is a train whether consisting of trucks laden with goods or of carriages filled with passengers. The character of the load makes no difference. Nor do I think that a locomotive is essential to the making of a train." Mr. Justice Cave said: "There is some little nicety whether a number of trucks in a goods station (as here) can properly be said to constitute a train. The trucks, twelve in number, were coupled together in the usual way. There was no locomotive engine attached to them; but the motive power was communicated to them through a capstan, which was worked by a stationary hydraulic engine. If this had been a train on the line of railway with a locomotive, and" the capstan-man "had been the driver of the engine, he clearly would have been a person having the charge or control of the train within the meaning of the Act. Does it make any difference that there was no locomotive engine, but a stationary hydraulic engine and a capstan under his control, and that the place was a goods station into which the line of rails

extends for the purpose of effecting the delivery of the contents of the trucks ? ”

It seems to us that what was the subject-matter of inquiry was not a train upon a railway, but a lot of trucks at a place for loading or unloading. It is said, “ If this had been (1) a train on the line of railway, (2) with a locomotive, and (3) the capstan-man had been the driver of the engine, he clearly would have been a person having the charge or control of the train.” No doubt, but the question is not whether the capstan-man had charge or control of, but whether what he had charge or control of was “ a train upon a railway.” It appears to us that when a journey is finished, the locomotive detached, and the trucks composing it are being unloaded at a platform, or being shunted towards the platform for the purpose of being unloaded, the train has ceased to exist, and the component parts of it resolve themselves into their separate elements, a locomotive and a number of trucks. A similar observation applies when the case is reversed, the locomotive has not yet been attached, and so on. In the present case at the most there was apparently not so much as even this,—there was only a number of trucks being made up into a train. Suppose a couple of empty trucks (and there must be at least two to constitute a train in any case) were being moved or shunted on a line of rails in a goods station by a couple of porters, what essential difference would there be between this case and that of the twelve trucks? The number of trucks is smaller, but the number is of no importance, supposing there are not less than two; the motive power and the place, it is said, and perhaps rightly, are of no importance; and the fact of being loaded or unloaded cannot be of importance, for a train may be a train though all the trucks are empty. Yet who would say, using words in their ordinary meaning, that a couple of empty trucks shunted by a couple of porters at a goods siding of a station is “ a train upon a railway ” ?

The “ locomotive engines,” etc., specified in the sub-section must be “ upon a railway.” What is “ a railway ” ? In *Doughty v. Firbank*, L. R. 10, Q. B. Div. 358, it was held that the term “ railway ” is not confined to railways completed and worked by a railway company, and subject to the regulations of the Railway Regulation Acts; and that it covered a temporary railway laid down by a contractor for the passage of trucks, etc., used for the purposes of the construction of works. In *Cox v. Great Western Railway Co.*, as we have seen, a line of rails at a goods station on which trucks were moved up to a platform in order to be loaded or unloaded was held to be “ a railway.” D. C.

(To be continued.)

REMARKS ON RECENT ENGLISH CASES.

Conditions in Passengers' Tickets.—The Court of Appeal on July 30 affirmed the judgment of the Queen's Bench Divison (Cave and Day, JJ.), in the case of *Haigh v. Royal Mail Steam Packet Co.*, noted in our last number. The question in the case, it will be recollected, was whether a claim of damages for the loss of life of a passenger, occasioned, as was alleged, by the fault of the company's servants, was barred by a condition in the passenger's ticket, freeing the company from any liability "for any loss or damage arising . . . from any act, neglect, or default whatsoever of the pilot, master, or mariners." It has been held that the condition was effectual to bar the claim. No question seems to have been raised as to the legality of a condition of total exemption from liability, supposing this were the meaning of the conditions of the ticket; and considering the course of the decisions upon the subject in the English courts, this is not surprising. At the time of the passing of the Railway and Canal Traffic Act of 1854, in contracts for the carriage of goods a condition of total exemption was held void as illegal. This was the common law at the date of the Act, and it was because this was the law that the Act was passed. The correctness of this statement may perhaps be doubted, after looking into some generally accurate English law books in which the matter is somewhat cursorily dealt with. But the subject is fully explained and the history of the law admirably narrated in the masterly and most erudite opinion given by Lord Blackburn as one of the consulted judges in the great case of *Peck v. N. Staffordshire Railway Co.*, in the House of Lords in 1862 (32 L. J. 241), an opinion which is a mine of information. If this was the law as to the carriage of goods, *a fortiori* it must be the law as to the carriage of passengers. The carrier of passengers has not the same function of public employment as the carrier of goods has, the obligations incident to which it is somewhat repugnant to public policy to allow him to get quit of. In *McCawley v. Furness Railway Co.*, L. R. 8 Q. B. 212, and *Gallin v. London and North-Western Railway Co.*, L. R. 10 Q. B. 212, a drover who as travelling with cattle had a free pass, but "at his own risk," was held to have no action against the company for injury, no matter though it were caused by gross negligence; and in the latter case the company was held free from liability not only during the transit, but whilst the plaintiff was going from the company's premises. In the former case, Mr. Justice Blackburn said: "Negligence in almost all cases would be the act of the company's servants. 'At his own risk' would certainly exclude that; and gross negligence would be within the terms of the agreement." In this case of *Haigh* there was no question either as to whether the condition had been assented to. The only

question was as to the construction of the terms of the condition. It was contended for the plaintiff that the "loss or damage" mentioned referred to damage to property, not to person. In considering the conditions in the ticket, the Master of the Rolls referred to an earlier condition than the one quoted, by which the company was not to be responsible for "any loss, damage, or detention of luggage under any circumstances." His Lordship referred to an unreported case in the Court of Exchequer which had been cited, and the manuscript judgment shown to him, where a stipulation against responsibility for "any loss" was held not to protect the company against loss by negligence. It seems to us that the proper answer to the argument from this decision is that it is a bad decision. It shows a great talent for painstaking research to rummage among unreported cases for a bad decision, as if that kind of commodity was a rarity. But the Master of the Rolls got over the effect of this decision by what seems remarkably like a quibble. He distinguished that case from the present, for in this there was the additional stipulation "under any circumstances." The only difference between the two cases that strikes us is, that the one says in two words what the other says in five. It is singular that, when rummaging among unreported cases, nobody seems to have lighted upon one in which, in a case against this same steamship company, the very condition in the present case was the subject of construction, and it was held that the words did cover loss by negligence, and that, too, negligence of a very gross kind. The case is *Thompson v. Royal Mail Steamship Co.*, June 4, 1875. In that case a passenger ill of fever was landed in an insensible condition at a port on the voyage (one of the conditions entitling the company to land passengers ill of an infectious disease), his luggage was put on the wharf, and of course was never more heard of. The same interpretation had been put on similar words in a previous case against the Pacific Steamship Co., also unreported. But surely the love of precedent is carrying us too far in all these inquiries. What is the use of pottering over authorities and disinterring decisions in order to find out the meaning of plain and simple words in ordinary use? In construing the terms of a contract, what we wish to get at is what was in the minds of the parties to it at the time. No doubt these authorities show what the courts have considered as may reasonably be supposed to have been the meaning of the parties at the time. But without the aid of any court we may reasonably suppose that when two people in making a contract of every-day occurrence use plain, ordinary words, they understood them in their plain, ordinary meaning. The words "any loss" therefore mean, what shall we say,—why, just "any loss;"—you cannot find better words to express it. The Master of the Rolls holding that the words in the condition as to luggage in the present case protected against the case of loss by negligence, and so loss of luggage

being thus fully provided for, the inference was that the "loss or damage" mentioned in the subsequent condition must have referred to damage to person; there was nothing else to which it could refer which was not provided for before. As to the meaning of the word "damage," the Master of the Rolls said that on consideration the Court could not say that injury to a person was not covered by it, and therefore an injury even to the extent of loss of life caused by act, neglect, or default of the mariners, was one from which the company had relieved itself by stipulation.

In this case of *Haigh*, the view does not seem to have been presented, certainly it was not taken, that a condition protecting from liability for any loss applies only to loss during the transit, not to loss through the non-performance of the voyage. The vessel had been sunk in a collision in mid-voyage. This view was urged in the Court of Exchequer in the case of *Thompson v. Royal Mail Steam Packet Co.*, and rejected. It met with a better fate in the Court of Session in the leading case of *Henderson v. Stevenson*, 2 Nov. 1873, 1 R. 215. The condition there was, that the company should incur no liability in respect of loss or injury to the passenger or his luggage through the neglect or default of the company. Two of the judges of the Second Division held, as the House of Lords afterwards did, that the condition was not assented to, but the whole of the judges of the Division took the view which is thus expressed by Lord Moncreiff: "Did these conditions . . . embrace the contingency of the non-performance of the voyage, or did they only relate to incidents and risks occurring during the voyage? I am of opinion that the non-performance of the voyage, caused by the fault of the defenders, was a breach of the essence of their contract which the conditions did not touch and were not intended to reach." It may be observed that although the presumption is against a passenger contracting to free from all liability, yet it is quite conceivable that a passenger might choose to agree to such a condition; and if he did so, what more apt terms, what broader or more comprehensive terms could he use than those in *Henderson's* case? Certainly the condition in *Haigh's* case, in the view taken of it in the Court of Appeal, is an extreme one; and the argument might possibly be taken, that a passenger could hardly have intended to assent to a condition in the sense of its protecting from liability for the loss of his own life—a condition which was to bind his representatives, and them only. In dealing with stipulations in contracts, our Scottish courts have more than the English courts chosen to exercise a power of understanding in a reasonable sense stipulations most absolutely expressed, when circumstances have emerged which would make them lead to oppressive and unreasonable results if read in their strict and literal sense. Thus in *Morton v. Graham*, Nov. 30, 1867, 6 M'P. 71, and *Cadzow v. Lockhart*, May 19, 1876, 3 R. 666, clauses in leases excluding the tenant

from all right of compensation for damage from game have been held not to exclude a claim for compensation when the increase of game has been excessive, while the opposite has been held in England.

A condition so completely excluding liability as that under consideration, would not receive effect in cases to which the Railway and Canal Traffic Act applies, not being such as the court would consider "just and reasonable," as the Act requires. It has been said that in construing conditions in cases not under the Act, it is not immaterial to remember this provision of the Act, and that the conditions should be read in harmony with the spirit of the Legislature. Of course a meaning which will make a condition a reasonable one is to be preferred if the terms admit of it, and that altogether apart from the Act. This is entirely different, however, from requiring that the condition shall be reasonable. In a case not under the Act, such as a contract between a passenger and a steamship company, any materiality which the Act has is this, that the Legislature has made a provision for a cognate class of cases, but has deliberately chosen not to make it for this.

The Legislature did not choose to extend the limitations on freedom of contract beyond inland traffic in goods. Steamship companies are in a different position from railway companies. They are merely private enterprises; they have no exclusive powers derived from Parliament; Parliament has given them no monopoly. A steamship company does not require to apply for an Act of Parliament before it can start its steamers, and there is no "notice to take" in the case of the ocean.

Running Water—Grant by Non-Riparian Owner.—The two cases of *Ormerod v. Todmorden Mill Co.* in the Court of Appeal, April 25, L. R. 11, Q. B. D. 155, and *Kensit v. Great Eastern Railway Co.*, May 5, L. R. 23 Ch. D. 566, bring out by contrast the extent of the right to the use of running water by a non-riparian proprietor who has received a grant, or rather a permission, of the use from a riparian proprietor. In the latter case the defendants, the railway company, had built their railway on a strip of land purchased from the plaintiff, and the stream in question flowed through a culvert. They gave a non-riparian proprietor a licence to pass a pipe through their land to the stream, through which pipe water was taken for cooling or condensing purposes connected with his business as "a saccharine manufacturer" (a sugar-maker, we suppose), and the water was discharged through another pipe into the stream before it left the company's land, undiminished and unpolluted. The plaintiff, who was a lower riparian proprietor, was found to have no right to prevent this use of the water. His right and enjoyment of the flow of water remained unimpaired, just as if no such use had been made. For him it was argued that if the act in diversion of the water was not checked, a right might be gained by the person so using the water. "This," said Baron

Pollock, "is an extremely important question when it is remembered that the right to the use of flowing water is measured not by the amount which may prevent a lower riparian proprietor from having enough, but by the right of the higher riparian proprietors who are entitled to use such quantities as they may want for ordinary purposes." If houses were built along the bank, and each person should use water even for domestic purposes merely, those lower down might not have enough, consequently "it is extremely essential to see that we do not put any further burden upon the lower riparian proprietors by letting persons extract water for a purpose which is not *per se* legal." But the answer to the objection was, that "the time from which any right would begin to accrue would be not the time at which the diversion was made, but the time from which it could be said that his water right was disturbed in quantity or purity."

In the other case, the defendants, non-riparian owners, by leave of a riparian owner, conducted water to their works and returned it to the stream in a heated condition, and in a slightly diminished quantity, conducting it at 38 feet and returning it at 37 feet of water per minute. This was held sensibly to affect the flow of water. The Court held that the riparian owner could not, except against himself, confer on one who was not a riparian owner a right to use the water of the stream, and a user which sensibly affected, as this did, the flow of the stream could be stopped.

In the case in the Court of Session, *Melville v. Dennistoun*, 21 May 1842, 4 D. 1231, the same principle was given effect to. One who was not a riparian proprietor fixed a pipe into a water trough from which the inhabitants of a village had been in the custom of taking water, and drew off and used for domestic purposes the surplus which would have, but for this, flowed into the stream. He was found not entitled to do so. In *Ormerod's* case one argument was taken by the successful party which would have equally operated against the right of a riparian owner. It was that, "as the defendants are using the water for manufacturing or extraordinary purposes, that is not for original purposes, it does not matter whether the river is used reasonably, but they must take care not to inflict a sensible injury upon the other riparian proprietors." This argument was not accepted by the Court, and the answer of the Master of the Rolls is worth noting: "It may be that the question what is an extraordinary use depends upon the development of trade in the neighbourhood, and on the use to which the water of rivers is put in the adjoining district. I am not prepared to negative that argument, but rather I am prepared to adopt it. The diffusion of trade may make a great change as to what constitutes an extraordinary use of running water. But I do not decide this point, because the defendants are not riparian proprietors."

Putting these two cases of *Kensit* and *Ormerod* together, the whole

thing comes to this, that a non-riparian owner who has received licence from a riparian owner cannot be prevented from the use of the water, if that use does not alter the quantity or the quality of the water; but he can be prevented if it does so in any sensible degree, even though the use is such a reasonable use as the proprietor granting the licence might himself make.

Libel—Publication to non-Privileged Persons by mistake for a Privileged Person.—When a person writes a letter defamatory of another, he should take care not to put his letter in the wrong envelope. The defendant in *Tompson v. Dashwood*, L. R. 11, Q. B. D. 43, did so, and this led to some unpleasant feeling, and also to a litigation. The defendant, a director of a company, wrote to the chairman of the company a letter regarding the plaintiff, who was the managing director, containing defamatory statements to the effect that the secretary's cash-book should be looked into, to see what sums had been entered for the plaintiff's travelling and other expenses, which, it was said, were excessive. The innuendo was that the sums as charged had not really been incurred. The defendant was writing another letter about another matter to the secretary of the company, who was the brother of the plaintiff. By inadvertence, the defendant put the letters in the wrong envelopes. The question of course was raised, but its determination was unnecessary in the view the Court took, whether a communication to the secretary was privileged. The letter would have been privileged if it had actually been sent to the chairman for whom it was intended. The question was, whether the letter still retained its privilege when intended to be sent to a person to whom it would have been a privileged communication, but actually sent to a non-privileged person. The Court held that it was privileged. Mr. Justice Watkin Williams said: "The law stands thus. If a man writes and publishes of another that which is defamatory and untrue, the law will imply malice on his part, and the plaintiff need furnish no evidence whatever of malice; he need only prove the defamatory and untrue character of the statements. [In our courts at least it is not for the pursuer to prove that the defamatory statement is untrue, it is for the defender to set up and support the defence that it is true.] But there are occasions on which the law regards the defendant as so placed, and having such an interest with respect to the subject-matter of the libel, that, upon principle founded upon common sense, the presumption of malice is removed. That is the doctrine of privilege. . . . It is admitted that," in writing to the chairman, "the legal implication of malice was technically rebutted, and the defendant, in the absence of malice in fact, was protected by privilege; but it is contended that," in the circumstances narrated, "the protection of privilege is destroyed, and the case put into the condition in which the law implies malice. I think there is a fallacy in that contention. The defendant's state of mind was

never altered. His intention always was to do that which he conceived to be his duty. I can see nothing to justify the conclusion as matter of law, that by reason of the defendant's inadvertence the case is taken out of the category of privilege, so that malice is implied."

We own that this seems on the face of it very strange doctrine. If the principle should be carried out in its integrity, and applied, not in such a comparatively small matter as that of privileged communications, but generally, it would be productive of a considerable alteration in the law as to responsibility; for it amounts to this, that the intention is to have the same effect as the fact. The common-sense view of the matter is, that although by sending the letter to the chairman, a privileged person, the defendant would have been doing what he had a right to do, yet by sending it to another he was doing what he had not a right to do, and he must make compensation for the damage he had done.

If one intends to shoot at a target but happens to shoot a man, he must make compensation; the intention in shooting makes a difference in his criminal liability, but not in his civil. The learned judge says: "It is contended that in the circumstances the protection of privilege was destroyed" (the contention rather is that it never existed), "and the case put in the condition in which the law implies malice. There is a fallacy in that contention. The defendant's state of mind was never altered. His intention always was to do that which he conceived to be his duty." There is, as it seems to us, a mis-statement here. The malice technically presumed from writing a defamatory letter is technically rebutted by what? By the *fact* of making the communication to a privileged person, not by the *intention* to do so. The occasion may justify or excuse the publication, but to have that effect the occasion must exist. The law protects a man in certain circumstances because he is honestly doing his duty; but it does not protect him because he intends honestly to do his duty, but does something else. Then there is a fallacy in the statement regarding the "intention" which remained unaltered, arising from confusing between one intention and another. The argument is this: If the letter had been sent to the chairman, the presumption of malice would have been overcome; malice is a thing of intention, and the intention here remained the same. Wherefore there was no malice to be presumed. Now it is not all one intention. There is the intention of malice presumed from the defamatory nature of the writing, and there is the intention to make a privileged communication. But the existence of the latter intention does not show that no intention of malice ever existed. If it did, it would disprove the existence of actual malice, which of course it does not. The sum of the matter is this: It is the fact of a communication being privileged that destroys the presumed intention of malice, and the intention of publication to a privileged

person has nothing to do with the intention of malice in writing the defamatory statement.

In a case in the Irish courts, *Fox v. Broderick*, 14 Irish Law Reports 453, another question was involved as to the effect of sending a letter by mistake to a person other than him for whom it was intended. The defendant wrote a letter defamatory of the plaintiff, intending it for the plaintiff, but misaddressed it so that it came into the hands of another person. It was argued that no action would lie, because if it had reached the person for whom it was intended, the letter would not have been actionable. (In Scotland, a defamatory letter in statement to the person defamed is a good ground of action, our law allowing *solatium* for mere injury to feelings. *Mackay v. M'Caskie*, Jan. 27, 1883, 10 R. 537. The English law takes a different view on this subject, not allowing compensation for wounded feelings.) It was held that there was a good ground of action. "Publication to person defamed is not privileged; only no civil action will lie, because such malicious publication would have no tendency to injure the plaintiff's reputation. But the defendant, where his voluntary and malicious act in parting with the possession of the letter is so done, though by accident, as to have that tendency, cannot rely, as rebutting malice, on the absence of intention to give the plaintiff a remedy by civil action. . . . What the defendant really relies on is the absence of intention to give the plaintiff a civil remedy for his malicious act."—*Per Fitzgerald, B.*

THE ENGLISH AND THE FRENCH BARS.

THE meeting convened by a great many members of the English Bar with a view to organizing their body for the better protection or advancement of professional interests, has led to the appointment of a committee, who have been deputed to carry out the objects of the requisitionists. In the words of a motion proposed by Mr. Glasse, Q.C., they are "to collect and express the opinions of members of the Bar on matters affecting the profession, and to take such action thereon as may be deemed expedient." At first sight it might seem that the public had no very direct interest in all this. The professional concerns of any body of men touch the members of that body, but only affect the outer world in an indirect fashion, unless it happen that professional interests are so urged as to clash with the public convenience. There may not be much danger of this in England, but it may be well to point out, as a mere matter of precedent, what has occurred through the trade-union-like organization of the Bar in a neighbouring country. The various Bars of France—there is one attached to each of the twenty Courts of Appeal—have for centuries been constituted in a

manner that is in many respects admirable. Each has its *bâtonnier* (originally the standard-bearer of the Order), an elective Council, and a code of rules and traditions, which, while maintaining a high level of character among members of the Bar, enables the humblest advocate to feel that if he is injured or insulted he will have the support of a powerful corporation in seeking redress. To barristers individually this is of great benefit, but the gain to the public has been doubtful; and it is certain that the profession as a whole has suffered from the *esprit de corps* which has brought it repeatedly into conflicts with the judges and with Governments. It is a little more than a century ago that the whole Bar of Paris avoided the courts in consequence of Chancellor Maupeou having exiled the Court of Parliament and appointed six creatures of his own to be judges. The dispute had arisen out of the Parliament's attempt to check the maladministration of a provincial governor, and the judges were right in the matter; but the Bar, in espousing their quarrel, caused immense inconvenience to the public. During three years 300 advocates, including all the most eminent, refused to plead, and the Chancellor had recourse to bribes in order to induce 115 others to take briefs. He also prevailed upon his new court to issue a decree authorizing solicitors (*procureurs*) to practise at the Bar. When Louis XVI. came to the throne, he immediately recalled the old Parliament, whereupon the barristers proceeded to ratten upon the 115 who had not joined in the strike by refusing to hold briefs with them, so that most of these proscripsts were ruined and two committed suicide. There is more to be said in justification of another strike that took place at the beginning of the Fronde, when Mazarin ordered three Councillors of the Parliament to be arrested; for the spirited conduct of the Bar in this emergency obliged the Cardinal to yield. But on several other memorable occasions the body of *avocats* withdrew from the courts and brought the administration of justice to a standstill from motives of pure trade-unionism. In 1605, under Henry the Fourth's reign, a barrister having charged the Duc de Luxembourg a fee of 1500 crowns, Sully, the Minister, who was the Duke's kinsman, instigated the Court of Parliament to declare that such high fees were illegal, and to require that in future fees should always be marked upon briefs, and that written receipts should be given for them. This obligation of delivering receipts was one, however, against which the Bar had always protested. There had been a strike on the subject under the previous reign, when Henri III., after denouncing the rapacity of lawyers in the ordinances which he issued at Blois, found himself too weak to enforce obedience, and so revoked his decree. Sully was not the man to yield, but the Court of Parliament gave in as soon as it was seen that the Bar would make no sort of concession. Frightened by the deadlock in legal business, and yet ashamed to cancel their own edict, the judges took the singular step of petitioning the King to overrule

it, thus establishing a dangerous precedent for the interference of the Crown in professional disputes. All these adventures did the Bar no good. Kings and Ministers came to dread it. The public regarded it as a body having too shrewd an eye to the main chance; and the result was that in 1790, soon after the outbreak of the Revolution, the National Assembly suppressed it altogether, declaring "that every man ought to be at liberty to plead in a court of justice." Napoleon reorganized the Bar, but remarked when he did so that he was animated by no friendly feelings towards the profession. He, in fact, drew up a constitution for it by which the nomination of the *bâtonnier* and Council were vested in Government. The Bar recovered some of its franchises under the Bourbons in 1822; and all of them in 1833. But once again the most important privileges of its self-government were confiscated by Napoleon III. in 1852, and it was only under the Third Republic that it got back the full independence which it had enjoyed under the old monarchy, but had forfeited through a too exclusive concern for professional interests.

It is one of the complaints of English barristers that they cannot always hold their ground in professional encounters with solicitors. This is also an old grievance with French barristers; but it is a significant fact that, while the French Bar so often put itself in the wrong by arrogant assertions of prerogative and strikes which threw the entire legal business of the country into confusion, the solicitors, who never struck work, and who defended their privileges in the most noiseless way possible, have never been subjected to any sweeping measure of abolition or even of reform. Their corporation has remained almost unaltered, while everything else in France has changed. To this day the offices of *avoué* (solicitor) and *notaire* (conveyancer) are bought as commissions in the army used to be; but the Syndical Chambers of *avoués* and *notaires* have made rules which keep their respective orders in such high repute that no Government has any excuse for meddling with them. Thus, if a solicitor embezzles funds entrusted to him, the loss is often, if not always, made good to the sufferer at the expense of the corporation, and the unworthy member is struck off the rolls after a deliberation of the Council, but with very little publicity. The barristers, on the other hand, have somehow never succeeded in washing their professional dirty linen quite so privately, nor have they managed to keep their professional business quite apart from politics. The most eloquent orator at the Bar of Paris—M. Charles Lachaud—who died a few months ago, could not get himself elected to the Council of the Order because he was a Bonapartist; and it has happened more than once that, in considering whether an offending member should be disbarred, the Council has condemned as unprofessional conduct that which was simply extreme zeal in some political cause distasteful to the majority. Again, the great susceptibility of French barristers as

to affronts from the Bench has often goaded judges into retaliation. There has not been for many years such a sharp sentence as that which was passed under the Empire upon M. Emille Ollivier, who was debarred from pleading for six months for alleged impertinence to a judge. But sentences of suspension for one month have been pretty frequent, and not long ago, a judge at Lyons having threatened to inflict a punishment of this sort, the whole Bar of the city took offence, and talked of "striking" till an apology was offered. No one would contend that the affairs of the French Bar are managed otherwise than with prudence and dignity by *bâtonniers* and councillors, who assuredly do their best at all times to avoid quarrels; but the examples given will serve to illustrate the sort of difficulties with which a highly-organized corporation has to deal in its endeavours to live at peace with the world, while advancing the interests of its own members.

A further proof of this might be adduced in respect of the long-standing disputes between barristers and solicitors touching fees. After innumerable wrangles both sides have been obliged to cease from strife and to agree that suitors shall be mulcted without any particular regulation on the matter. It is not contrary to the etiquette of the French Bar for an advocate to tout for briefs, or to bargain for his fees directly with a client, or to take a case into court—at least into certain courts—without assistance from a solicitor. The only rule in force is that a barrister must not send in a written bill to a client nor give him a receipt for fees. Defendants in criminal or political causes, Press trials, and the like, generally go straight to an *avocat*, and do not consult an *avoué* at all. In certain cases where the law obliges parties to be represented by an *avoué*, advocates are often consulted in the first instance, and it is they who recommend solicitors, instead of being recommended by them, as is the custom in this country. This arrangement suits the French public, and it probably suits barristers; but it has been arrived at in defiance of one of the strictest statutes of the Order, which required that the professions of barrister and solicitor should be kept separate, because the *avocats* deemed it beneath their dignity to haggle about fees. In pocketing its dignity as to this question, the French Bar has much reduced the business which *bâtonniers* and councillors formerly had to transact, and which consisted in privately trying and censuring solicitors for underpaying briefs. At the same time the new system has deprived the Councils of the Order of much of their *raison d'être*. It would not be too much to say that these bodies survive now rather as archæological curiosities than for any thoroughly useful purpose. The cases brought before them—cases arising out of the misconduct of individuals—are generally of a sort which busy men find it very troublesome to investigate and annoying to adjudicate upon; while the occasional necessity for resenting, in the name of the whole corporation of barristers,

slights offered by some hasty judge to an equally hasty counsel is not a very pleasing duty either for men of a conciliatory turn. M. Grévy was for two years *bâtonnier* of the Paris Bar, and he used to say that his chief occupation during that time was "to try and make angry men shake hands, which they would probably have done of their own accord if I had not been there."—*Times*.

The Month.

Is an Englishwoman's House her Castle?—A case which will be of far-reaching importance under the Married Women's Property Act was decided by Mr. Justice Chitty last week. A husband had left his wife, and was, it was stated, in occupation of a separate establishment; but he occasionally returned to the house in which his wife was living, and on leaving took with him any article on which he could lay his hands. The house had been comprised in the marriage settlement, and was settled upon trust for sale with consent of both husband and wife; while the house itself until sale, and, when sold, the proceeds of sale, were to be for the separate use of the wife, without power of anticipation. Acting on the precedents of *Green v. Green*, 5 Hare 400, and *Allen v. Walker*, L. Rep. 5 Ex. 187, Mr. Justice Chitty, on the application of the wife, made an order restraining the husband from going to the house. It was urged that this was in effect to grant a judicial separation, which could only be done in the Divorce Court; but the learned judge pointed out that it was only granting the wife that protection for her property to which she was as much entitled against her husband as against a stranger; and if the husband was aggrieved he could provide another house for his wife, and if she refused to live there, could sue for the restitution of conjugal rights. As in such a case he could scarcely be successful, it is obvious that under the new Act, by which all a married woman's property is henceforth settled to her separate use, the power of the wife is likely to be materially extended, not only over her property, but also over her person.

The Court of Appeal were greatly exercised in their minds on Friday by the above decision. The case was, with a somewhat excessive delicacy, reported in the *Times* under the no-name of — v. —, which is not a very convenient designation, and has been confined hitherto to matrimonial cases in which the details were unfit for publication. However, the real name is given in newspapers of less refinement as *Symonds v. Halkett*, and, as it is likely to be a leading case, it is just as well it should not remain anonymous. Lord Justice Cotton pointed out, as we did, that "if Mr. Justice Chitty's decision was sound, it would enable every

married woman who had a house of her own under the Married Women's Property Act to turn her husband out of it, and apply to the Court to restrain him from entering it." The Master of the Rolls, with a singular forgetfulness of the manner in which nearly all the most important questions which come before the Chancery Division are decided, asked "whether the Court could be expected, upon an interlocutory application of this sort, to decide a question which might have the effect of altering the whole social life of England." In the result, however, they did what they could hardly help doing, as the law on the subject was settled more than forty years ago, and had been acted on ever since, and confirmed the decision of Mr. Justice Chitty. But they carefully guarded themselves from laying down any general principle that a married woman could turn her husband out of her house and keep him out. Surely all this scrupulosity is ill founded. A man can turn his wife out of his house, and her only remedy is that precarious and scandalous one of a suit of restitution of conjugal rights. Why should not a woman have an equal right? The Vice-Chancellor of England in 1840 laid it down in a precisely similar case (*Green v. Green*, 5 Hare 400), that the "Court had only to consider whether a trust for the separate use of the wife was created. There was nothing unlawful in the settlement, and he saw nothing to prevent the Court from protecting the interests of the parties under it. If the injunction had the effect attributed to it, viz. of operating as a divorce *à mensa et thoro*, a question which he could not determine, the husband would not be without his remedy in the Ecclesiastical Court." Sir Lancelot Shadwell was not a person careless of the results of legal decisions, but he knew that his business was to decide according to law and equity, and he did decide accordingly. If his decision was right (and it was practically approved of by the Queen's Bench in *Allen v. Walker*, L. Rep. 5 Ex. 187, in 1879, by Martin, Channell, and Cleasby, BB.), in a case in which the separate use was created by the parties in "derogation of the common law," *à fortiori* must it be right now when the separate use is made a necessary incident by the express declaration of the Legislature in a statute which has abrogated the common law. Nor can the fact that the statute has extended the rule of law from a few to a large number of cases affect the justice of the rule. In actual life there is not the least danger of the right being exercised in cases where it is not right that it should be exercised. Married women are not so anxious to drive away their husbands without cause as alarmist politicians seem to think, and in cases like that before the Court it is eminently desirable that the husband should be treated in fact, as he is in law, as a stranger to his wife's separate property. At all events, the decision of the Court may be taken to have overruled its *obiter dicta*, and carefully as each member of it guarded himself against laying down any general rule, yet the general rule is

necessarily implied in, and forms, the only *ratio decidendi* of the particular decision.—*Law Times*.

International Law Association.—The International Law Association is to hold its meeting this year at Milan, from the 11th to the 14th September. Amongst the subjects on the programme for discussion at the Congress we observe those of Bills of Lading, Foreign Judgments, Conflicts of Marriage Law, and International Copyright, on all of which reports will probably be presented by committees appointed at former Conferences, and useful and interesting debates may be expected. An address lately issued by the Association, with the object of obtaining fresh adherents in place of many whom it has lost by death, calls attention to the beneficial influence exercised by its annual conferences, held in different European centres, and attended by statesmen, jurists, and merchants from many countries; and dwells upon the useful part taken by the Association in bringing about a consensus of opinion and practice on the subjects of general average, the law of affreightment, bills of exchange, and patents for inventions.—*Law Times*.

Descriptions by Auctioneers.—Auctioneers, like poets, are properly allowed a certain licence in the indulgence of their flights of fancy. But there is a limit to everything; and it is satisfactory to see, from the case of *Smith v. The Land and House Property Corporation*, which came before Mr. Justice Denman, sitting in the Chancery Division on the 26th July, that the law draws the line somewhere even in auctioneers' puffs. The defendants had bought the Marine Hotel, Walton-on-the-Naze, from the plaintiffs. The printed particulars of sale described the premises as "now held by a very desirable tenant for an unexpired term of twenty-eight years at a rent of £400 a year," and the auctioneer had spoken of the tenant as a "most desirable tenant." As a matter of fact, it transpired that this most desirable tenant was largely in arrears as to his rent, and had long been on the brink of insolvency, over which he finally fell within six weeks after the sale. The defendants claimed to have the contract rescinded on the ground of misrepresentation, and resisted the specific performance asked by the vendors. The auctioneer stuck to it in the witness-box that his statements were merely an expression of opinion, and that his opinion was not material. The learned judge, however, came to a contrary opinion, refused specific performance, and ordered the contract to be rescinded.—*Law Times*.

Mixed Marriages.—Every one will remember the general feeling of indignation in this country a year or two ago occasioned by some heartless cases of desertion of English girls by foreign husbands, generally of French origin, who had married them in England with all ceremonies required by the laws of England, and had then deserted them in France on the ground that all the requirements of French law had not been complied with. It was obviously impracticable to induce foreign countries to alter their

marriage laws to meet a few cases of hardship occasioned to British subjects by their requirement, but the case was one in which it was imperatively necessary for something to be done on this side of the Channel; and the Social Science Association have rendered good service to their countrywomen by preparing the memorandum on the subject of intermarriages of English women with Frenchmen or Belgians, which has just been reissued by the Principal Registrar of the Province of Canterbury. This memorandum contains a short and precise account of the requirements of French and Belgian law for the validity of intermarriages of French or Belgian subjects in England with English subjects. These appear to be, with respect to subjects either of France or Belgium, that (1) no man can marry under eighteen, and no woman under fifteen, without a dispensation; (2) no man under twenty-five, or woman under twenty-one, can marry without the consent of parents (if any), or, if none, of grandparents (if any), or, if none, of a family council; (3) no man or woman above the last-mentioned ages can marry until after a respectful communication of intention so to do has been made to the person whose consent would have been required if he or she had been under age, nor until a further period of delay has expired; (4) the intended marriage must be announced in France or Belgium, as the case may be, by a species of publication of banns at the Town Hall. If any of these requirements are not observed, the marriage is null, so that it is essentially necessary for an English subject marrying a French or Belgian subject to see that there is no omission. It may seem singular to English eyes that a man like the late M. Gambetta, *e.g.*, could not marry without obtaining, or at least demanding, his father's permission, and also that the observance of all ceremonies required in the country where the marriage is celebrated is not accepted as sufficient in France and Belgium to render the marriage a valid one; but while those countries continue to insist upon the strict performance of all their conditions, much evil may be averted by a general study of the Social Science Association's paper. Many would consider that there was but little cause for regret if mixed marriages of the description in question were to cease altogether.

Jesting with a Chief Justice.—Lord Coleridge's speech at the Irving Banquet was not a success. He is not an effective after-dinner orator, and then he needs people to explain their jokes to him. Mr. Toole, for example, was frightfully depressed on discovering this fact—for which neither he nor the company were quite prepared. The "Mammoth Comique" of the old Folly Theatre made an allusion to the Tichborne trial, and playfully suggested that Lord Coleridge not only invited him to a seat allotted to a member of the Bar, when the case was going on, but to their "consultation" together. "How far," said Mr. Toole, in accents full of serio-comic earnestness, "in our consultation, I was

able to assist him in his difficult task must ever remain a profound professional secret between us;" an announcement received, as might be expected, with peals of laughter. Everybody saw that "Johnny" was simply giving "the Chief" a "cue" for a witty reply; and the dismay that seized on the company when Lord Coleridge took the great jester *au sérieux*, and proceeded with ponderous gravity to give an official and formal denial to the fact that he ever held professional consultation with Mr. Toole on the occasion referred to, was a spectacle never to be forgotten. Mr. Toole is said to have congratulated his friend Irving on having had better luck. "Suppose, Henry," said he on going home, "the Chief had mistaken you for a Comedian."—*Pump Court*.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF ABERDEEN, KINCARDINE, AND BANFF.

Sheriff SCOTT-MONCRIEFF.

MUNRO v. HIGHLAND RAILWAY COMPANY, AUGUST 18TH, 1883.

Reparation—Public Carriers—Railway and Canal Traffic Act—Reasonable Conditions—Alternative Rates for Carriage.—This was a case tried at Keith. The circumstances are sufficiently stated in the judgment of the Sheriff-Substitute, which was as follows:—In this case the pursuer sues the Highland Railway Company for £10, in name of damages in respect of an injury caused to a mare belonging to him during its transit from Muir of Ord to Keith Station by one of the defenders' trains. There is no doubt about the injury, but the defenders, in addition to denying that it was due to any act for which they are responsible, plead a special contract with the pursuer, which they maintain frees them from all liability. It appears that there are two rates at which the defenders carry animals, the higher of which is one-fourth more than the ordinary. Upon the ticket obtained and signed by the pursuer, and immediately above his signature, are these words: "Forward the above animals at the lower or ordinary rate, subject to the conditions on the back hereof." According to these conditions thus referred to, when animals are conveyed at the lower rate, the owner undertakes all risk of injury in conveyance, "whether arising from the negligence or fault (not being wilful) of the company or their servants, or from the fault of any other person or persons whomsoever." Now, this animal was carried, in conformity with the order which the ticket contained, at the lower rate. But the pursuer says that he was no party to such a contract, and that he did not make himself acquainted with the conditions. I am of opinion, in the first place, that he cannot take up this ground of defence. A reference to the conditions was on the face of the ticket, most distinctly printed, and, as has been already said, immediately above the pursuer's own signature.

If he did not observe it, that was his own fault. The circumstances here are quite different from those in the recent case of *Stevenson v. Henderson*, decided by the House of Lords (2 Ret. 71). The Lord Chancellor, in giving judgment, made special reference to the fact that there was nothing upon the face of the ticket referring the pursuer to the back, nor did the pursuer there adhibit his signature to an order which specially founded upon certain conditions. If I am not to infer knowledge and consent in the present case, it is difficult to conceive how a company could ever protect themselves by conditions, as the law allows them to do when not of an unreasonable character. This leads me to the second objection of the pursuer, which is, that the defenders' conditions are unreasonable and void in law. Now, under the 7th section of the Railway and Canal Traffic Regulation Act, any notice or condition limiting the common law liability of public carriers by rail or canal is declared to be null. Prior to the passing of this statute, the English courts, at all events, had gone great lengths in protecting carriers from the consequence of their own gross negligence. The question, then, was not whether a condition was reasonable or not, but whether it formed part of the contract between the consigner and the carrier. The Legislature very properly interfered. But while it has put an end to that unreasonable immunity which railway and canal companies had been in enjoyment of, it has still left to them the power of making conditions, with this proviso, however, that, before giving effect to such, the judge must consider them just and reasonable. Upon looking to the conditions in the present case, it is obvious that their terms are very wide, and would exclude almost every possible ground of action against the company. If no alternative had been offered to the consigner, I should have difficulty in holding such conditions reasonable. But, as has been already observed, the company have two rates, both of which they are, it is to be presumed, legally entitled to charge, and it has been quite recently held by the House of Lords that even a condition freeing a company from liability for loss, from whatever cause arising, was reasonable, in respect of the alternative rates offered by them to their customers (*Brown v. The Manchester, Sheffield, and Lincolnshire Railway Company*, 75 L. T. 238). Here, I may observe, the conditions hardly go so far, as the company still admit liability for wilful neglect (whatever that may mean) or fault. But the point really is, that the pursuer had it in his power, by paying the higher of the two rates for the transit of his animal, to impose upon the company their common law liability. He did not choose to do this, and therefore I think that the contract to which he had become a party is reasonable. It involved him in a certain risk, but at the same time it gave him the advantage of a cheaper rate of carriage. In determining the case upon this ground, I confess that I have felt a difficulty arising from the manner in which the defenders describe their rates. The lower is called the ordinary, and this is declared to free the company from their ordinary liability as carriers. Such is contrary to the practice of other companies as revealed by the decisions. With them it would rather appear an ordinary rate implies ordinary liability, and conditions similar to what we have here are offered with something lower than that rate as an inducement to comply with them. But if both rates are within what the company are legally entitled by their Act to charge, and I assume this, then the terms by which they are described are after all immaterial.

If, on the other hand, the company's highest rate were in excess of the statutory limit of charges, then it would be virtually an insurance, and might be held to invalidate the whole agreement. Apart from this question of special contract, I doubt whether at common law the pursuer has made out a case against the company. Carriers are not the absolute insurers of live animals (*Paxton v. North British Railway Company*, 9 Macp. 50; and *Ralston v. Caledonian Railway Company*, 5 Ret. 671). If this accident were not of a kind that the railway company were bound to have foreseen and provided against, there is authority for holding that they would be free from liability. The burden of proof in the first instance might lie upon them, but I think that in the present case they have led sufficient to shift it to the shoulders of the pursuer.

Pursuer's agent—John Fraser, solicitor, Keith.

Defenders' agents—Thurburn & Fleming, solicitors, Keith.

SHERIFF COURT OF FORFARSHIRE (DUNDEE).

Sheriffs TRAYNER and CHEYNE.

THE NORTH OF SCOTLAND BANK, LIMITED, v. DAVID LAWSON, MUIRHEAD OF LIFF, LOCHEE.

Bill—Onerous holders—Due negotiation—Presentment for payment—Notice of dishonour—Waiver of objections.—This was an action for payment of two bills for £200 and £30 respectively, drawn by the defender upon and accepted by John Davidson, potato merchant, Lochee, and endorsed by the defender to the pursuers. The pursuers pled (1) that they were entitled to decree in respect that they were indorsees and holders for value; and (2) that the defender was barred *personali exceptione* from pleading want of notice of dishonour and the other requisites of negotiation. The defender, on the other hand, pled (1) that the pursuers were not onerous holders; (2) that the pursuers were aware, when the said bills were endorsed to them, that they were accommodation bills for behoof of the said John Davidson, and that the defender had received no value from the said John Davidson; (3) that the bills were neither duly negotiated nor duly presented for payment, and the defender having received no valid or effectual notice of dishonour, he was entitled to absolvitor; and (4) that the pursuers having given the acceptor, the said John Davidson, time, they had thereby liberated the defender as drawer and endorser. Proof was led, and decree thereafter granted in terms of the prayer of the petition with expenses. The circumstances of the case are disclosed by the following interlocutors and notes:—

“*Dundee, 12th June 1883.*—The Sheriff-Substitute having resumed consideration of the process: Finds in fact, (1) that the pursuers are holders in due course of the two bills mentioned in the condescence, and forming Nos. 8 and 9 of process, drawn by the defender upon and accepted by John Davidson, potato merchant, Lochee; (2) that at the dates when said bills, which were payable within the pursuers' office at Lochee, and were then lying there, became due the said John Davidson had not sufficient cash in the pursuers' hands to meet them, and did not

meet them ; (3) that while it is the case that notice of dishonour of the said bills was not sent to the defender, it is proved that at or shortly after the dates when they became due, he called at the pursuers' Lochee office and entered into negotiations with a view to their being renewed, and also that he subsequently made various small payments, amounting in all to £2, 19s., to account of them ; and (4) that the defender's allegation, that the pursuers gave the said John Davidson time, has not been proved : Finds *in law* on these facts that the defender is barred from objecting to want of due negotiation or of notice of dishonour, his conduct amounting to a waiver of any such objections, and that the pursuers are entitled to decree against him in terms of the prayer of the petition : Decrees accordingly in pursuers' favour in terms of the prayer of the petition : Finds the pursuers entitled to expenses, allows an account of these to be given in, and remits the account, when lodged, to the auditor of court for taxation and report.

JOHN CHEYNE.

“ *Note.*—While Mr. Gray's mode of conducting business is, in various respects, open to criticism, I am unable to find sufficient grounds for relieving the defender from the liability which he was foolish enough to undertake on behalf of his friend Davidson. At the discussion the defender's agent did not dispute, what indeed is clear, that the pursuers are entitled to be regarded as onerous, *bona fide* holders of the two bills sued upon, but confined himself to the contention that his client was discharged by the pursuers' failure to present the bills for payment, and to give notice of their dishonour. Now, as regards the former of these two matters—the presentment for payment, I doubt extremely whether there was any failure of duty on the pursuers' part. The bills were held by the pursuers ; they were payable at their Lochee office ; they were lying there when they reached maturity ; and the officials were aware that the acceptor had not funds in the bank to meet them ; and in these circumstances I think that the cases of *Sanderson v. Judge*, 2 H. Bl. 509, and *Bailey v. Porter*, 14 M. & H. 44, warrant me in saying that there was sufficient presentment. It would have been an idle farce to take out the bills and lay them on the counter, which is what Mr. Agnew suggests ought to have been done. But, *esto* that there was not due presentment, I am of opinion that there is sufficient evidence in process to justify a finding that this objection, and also the objection that he did not get formal notice of dishonour, was waived by the defender. In the first place, he called at the bank—Mr. Gray says on the day the first bill fell due, or the day after, but certainly a few days after it reached maturity—and signed a blank bill stamp, with a view to the renewal of the bill on Davidson paying the discount ; and the same thing happened when the other bill became due. In the second place, he made various small payments to the pursuers during the course of the winter, which, there can be little or no doubt, were, notwithstanding the rather peculiar way in which Mr. Gray dealt with them, meant to be payments to account of the bills, and, indeed, are admitted by the defender on the record to have been so. In view of these facts, I am of opinion that the defender is now barred from stating an objection which would otherwise have been sufficient to discharge him. It is possible that there might have been some room for a plea of novation founded on the signing of the blank bill stamps, but as no such plea is stated, it is unnecessary to discuss it. J. C.”

On appeal the Sheriff adhered, and pronounced the following interlocutor and note :—

*“ Gilston, 1st August 1883.—*The Sheriff having considered the proof adduced and whole process, for the reasons stated by the Sheriff-Substitute adheres to the interlocutor appealed against, and dismisses the appeal. Finds the defender liable in additional expenses, and decerns.

“ JOHN TRAYNER.

*“ Note.—*So far as notice of dishonour is concerned, I think the pursuers' case very narrow; but any doubt I have on that subject is not sufficiently grave to induce me to differ from the Sheriff-Substitute. *J. T.”*

Act. Watt and Cæsar—Alt. Al. Agnew.

PERTH SHERIFF COURT.

Sheriff BARCLAY.

STEWART v. MACDONALD AND CAMERON.

This was an action at the instance of Donald Stewart, farmer, Drumglass, Dunalastair, Logierait, against Roderick Macdonald, hotelkeeper, Kinloch Rannoch, and Duncan Cameron, merchant, Kinloch Rannoch, for a joint and several decree against them, for the sum of £14, 8s., as the value of sheep and lambs alleged to have been killed and injured on the night of the 4th or morning of the 5th July last by two dogs belonging to the defenders which had been allowed to stray on the farm of Drumglass. It was averred that the dogs had killed sheep previously, and that the defenders were aware of that propensity. Both the defenders denied that their dogs, which were collies, had any vicious habits, and they knew of no reason why they should at the date referred to have been chained up. For the defender Cameron it was pled that at the date referred to his dog was suffering from a severe injury to one of its fore feet, and therefore whatever injury was done to the pursuer's sheep or lambs, it must have been done by other dogs than the defender's bitch. After a lengthy proof, and the hearing of agents, the following interlocutor was pronounced :—

*“ Perth, 27th March 1883.—*Having heard parties' procurators, and made avizandum with the process, proofs, and debate: Find as matters of fact—(1) on the 5th day of July 1882 the pursuer had three wedders, five ewes, four lambs, and one hogg killed, and four lambs injured, all his property, and that caused by a dog or dogs, and that the loss thereby sustained is fairly estimated at the sum sued for. But (2) it is not proved that the injury and loss was occasioned by both or either of the dogs, the property and in the possession of the several defenders. Therefore assoilzies them from the conclusions of the action; finds the pursuer liable to the defenders in the expenses of process, allows accounts thereof to be given in, and remits the same when lodged to the auditor of Court to tax and to report, and decerns. *HUGH BARCLAY.*

*“ Note.—*The action is laid on the 'joint and several' liability for the loss sustained by the pursuer in respect of the damage being occasioned by their several dogs 'acting in concert, or one of them assisted by the other.' It follows that should it be proved that it was impossible for any one of the

defenders' dogs to have been in co-operation, the case must fall. The case for the pursuer depends almost solely on the evidence of Stewart Campbell, Constable Allan, and Alexander Ferguson. But the contrary evidence must lead to the conclusion that these witnesses must have been mistaken in their observations early in the morning, especially that it appears that in the vicinity there are many dogs of like breed and colour. It appears that the defender's (Cameron) dog was on the day libelled wholly *hors de combat*, having its fore-leg fractured and "jellyfied," and was wholly incapable of not only travelling any distance, but of possessing power to undertake such an onslaught, not only on lambs, but on full-grown and vigorous sheep. Then there is proof that Macdonald's dog was shut up on the night in question. The good character of the dogs and their abstinence from worrying of sheep are established. The state of the dogs after the alleged act is adverse to their being actors therein, and the result of the *post-mortem* examination of one of the animals is also strong against the pursuer's case. H. B."

Parties acquiesced in the judgment, and therefore no appeal was taken to the Sheriff.

Act. T. Chalmers—Alt. R. Mitchell and J. Stewart.

PERTH SMALL DEBT COURT.

Sheriff BARCLAY.

BLACK v. WHYTE.

This is a case for £7, 10s. on an account as follows: "11th January 1883—To fanners as per invoice, £7, 10s." The facts are as follows:—*First*, One M'Call was an "agricultural implement agent" at Kinkell, near Auchterarder, and the pursuer Black is an agent in the same line in Perth. Neither of them manufacture the implements they sell, but sell for the manufacturers on commission, and may therefore be held, in one sense, as principals instead of as commission agents. *Second*, It is the practice between agents in that trade, when an article is asked which the agent has not in stock at the time, to hand or transfer the order over to another agent, and divide the commission between them. This was the practice between these two agents, but this was the first occasion of such a practice in reference to the defender Whyte. *Third*, The defender Whyte had a claim against M'Call, amounting to £13 odds, and, with the view of so far squaring accounts, he gave an order to M'Call for the fanners in question, but he did *not* mention his object to M'Call in giving the order to him. *Fourth*, M'Call had not the article at the time, but he arranged that the fanners should be furnished to Whyte in about a week from the time of the order. *Fifth*, Pursuer Black's name was not mentioned to the defender Whyte by M'Call at the time of the order. *Sixth*, M'Call transferred the defender's order to the pursuer Black. This appears to have been done verbally, and not by writing. *Seventh*, At the same time of the transfer, M'Call ordered some articles for himself from the pursuer Black. *Eighth*, The pursuer's books show that the fanners, under the 11th January 1883, are entered directly to the *debit* of the defender Whyte, and the other articles are

charged to M'Call—amounting to £2, 18s. *Ninth*, The fanners were forwarded and taken delivery of by the defender Whyte, with the following memorandum: “12th January 1883—From George Black, implement agent, 8 Victoria Street, Perth, to Mr. Peter Whyte, corn merchant, Crieff.—Sir, *Mr. M'Call*, Kinkell, told me to send on, as per the enclosed invoice, that he had none in stock. I hope that they will give you satisfaction; they are an implement that I sell a great many off. You will notice they have got a slight accident that I did not observe in time to get repaired, be good enough to do, *charging me the repair*; they are none the worse, and after being mended will not be noticed.—Yours truly, (signed) G. Black.” *Tenth*, An invoice was also sent by post some days afterwards by Black, in his name as creditor, and received through the post by defender in the usual form without challenge or remark. *Eleventh*, The defender made no answer to the memorandum nor the invoice. *Twelfth*, M'Call became insolvent and bankrupt. He has not entered the transaction of the fanners in his book, and has not given it as an asset due his estate. *Thirteenth*, The defender Whyte, in his book, enters the transaction in question in these terms—“January, *Mr. Peter M'Call*, Kinkell, fanners, £7, 10s.” The book also shows entries making up of his counter claim for £13 against M'Call. *Fourteenth*, The defender, on application for the debt by the pursuer, disputed his liability to the pursuer, but only to Mr. M'Call. *Fifteenth*, The pursuer, however, admitted that he applied to M'Call for payment of the claim after the refusal of the defender to recognise this claim, and he acknowledges that had either party paid him the price he would have allowed M'Call ten shillings, as being one-half of the usual commission of agency on the price of the fanners. M'Call acknowledged and swore that had he remained in Crieff on the day when the demand was first made, he would have paid Black the claim.

There could be no question but that had Black invoiced the fanners to Whyte under the name of the manufacturer and owner thereof, having thus revealed his principal and the defender having received them, the manufacturer would have been entitled to sue and recover the price against Whyte without any claim either by Black or M'Call as mere agents. The difficulty occurs from the circumstance that both these parties are agents for manufacturers, though in a question between themselves they are truly principals.

The pursuer argued in law that he having disclosed by the invoice that he was the creditor in the price, and the defender receiving the fanners after that notice became liable directly to him for the price. The defender pleads, on the contrary, that he gave the order to M'Call and not to Black, and that by the memorandum transferring the order to Whyte the pursuer was made aware that he was only acting for M'Call who was his debtor, and that the invoice could not change the position of parties, which was confirmed by his afterward demanding the claim from M'Call as well as from the defender Whyte.

“*Perth, 6th July 1883.*—The Sheriff-Substitute, feeling some little difficulty in this case, submitted these notes, so far as above written, to the Sheriff for his opinion, without divulging his own opinion. After some time the Sheriff has given that opinion which coincides with the result the Sheriff-Substitute had previously reached. There is no doubt

that the order for the fanners was given to *M'Call* and *not* to the pursuer *Black*. Had *M'Call* sued *Whyte*, and he had defended that *M'Call* had got the article from a fellow-agent, the pursuer *M'Call* must have prevailed. The pursuer has no plea but that *M'Call* had disclosed his principal by the invoice, and had entered the defender as his debtor in his business book, which *M'Call* did not, or render an invoice in his name. The invoice, however, is modified by the memorandum sent at the same time, to the effect that he, the pursuer, was acting solely for *M'Call*, because that he, *M'Call*, had not the article at the time in stock. So that the transaction was really between two agents, mutually accommodating each other and dividing the commission. The fact of the pursuer applying to *M'Call* for payment of the claim corroborates his holding *M'Call* and not *Whyte* as his proper debtor. Therefore absolver will be given in this action; but, under the whole circumstances, costs will not follow, and which, fortunately, are very trifling.

“HUGH BARCLAY.”

Act. M. Stewart—*Alt.* R. Mitchell.

SHERIFF COURT OF FORFAR.

Sheriffs ROBERTSON and TRAYNER.

WEIR *v.* SCOTT.

Some weeks ago Sheriff-Substitute Robertson, Forfar, had before him a case under the Employers' Liability Act, at the instance of Mary Weir, residing at 23 Gowan Street, Arbroath, against Messrs. Scott Brothers, millowners, Arbroath. She sued for £25 in name of damages for injuries she had received in consequence of alleged negligence on the part of the defenders. She stated that she was a factory worker in the employment of the defenders in the Pool Mill, Arbroath, on 21st March last. While engaged in her ordinary occupation of attending to a finishing card in motion, on the first system of jute spinning, by feeding it and otherwise, she had occasion to stop the motion of the card by shifting a driving belt or band which connected it with the shafting, and by which the former was driven. To do this she had to lay hold of the belt or band with her hand, there not being any shifting rod or other appliance provided to the card by which the purpose could be effected. While endeavouring to stop the card by this means, the belt or band slipped from her fingers, and she lost her balance, falling over against a “cramper” in motion alongside the card. In the act of falling she threw out her hands to steady herself against the “cramper,” when her right hand and fingers were caught by the moving machinery and crushed and maimed. Since the accident pursuer had learned that the finishing card and crimper had been defective—the former through the want of a shifting rod or slide; the latter owing to its not being cased, sheathed, or fenced; and she alleged that the accident resulted from the fault and negligence of the defenders or their superintendent or others for whom they were responsible. By the accident pursuer, who stated that she was 22 years of age, unmarried, and had no other means of subsistence beyond her earnings, which at the time of the accident amounted to 9s.

6d. weekly, had been deprived of the full use of her right hand. The Sheriff-Substitute, in his decision, in respect of the nature of the evidence adduced, which was conflicting, though pointing to default on the part of the defenders, only awarded pursuer three guineas as compensation. Against this decision an appeal was made to Sheriff Trayner, who has just issued judgment, finding the defenders liable to the pursuer in damages to the extent of six guineas, with expenses. The following is his lordship's interlocutor and note :—

The Sheriff, having heard parties on the foregoing appeal, and considered the proof adduced and whole process: Adheres to the interlocutor appealed against in so far as it concerns all findings in fact: *Quoad ultra* recalls said interlocutor: Finds in law that the defenders are liable to the pursuer in damages for the injury sustained by her: Assesses the same at six guineas sterling: Finds pursuer entitled to expenses, and remits to the auditor to tax the same on Scale I., and decerns.

(Signed) JOHN TRAYNER.

Note.—On reading the evidence it does not appear to me to be clearly proved that the shell-breaker was properly fenced; but, as the evidence is conflicting, I do not feel at liberty to dissent from the view of the Sheriff-Substitute, who saw the witnesses when they gave their testimony. I entirely concur in the Sheriff-Substitute's views as to the fact of its being the custom in the defender's mill to allow the women to put on and off the belt which communicated motive power to the machinery they were attending to. On all hands it is confessed that that was not a woman's work—that the foreman should have attended to it. It is also certain that the pursuer was never told that she was not to touch the belt, or that the foreman would do so for her on her application. Further, there is no evidence that the pursuer caused the accident by her own carelessness or inattention. I think the amount of damages allowed by the Sheriff-Substitute too small. He has only allowed what the pursuer will have to pay to the doctor who attended her. If the defenders are liable at all, as I think they are, they are liable not only for the doctor's expenses, but something also to the pursuer on account of what she lost as wages and for the pain she suffered. The injury sustained by the pursuer was happily not very serious as regards permanent results, but must have been very painful for some time. I think six guineas a very moderate amount of damages indeed; as the defenders made no tender, but denied all liability, I have allowed the pursuer expenses on the lowest scale.

(Intld.) J. T.

The agents in the case were:—For pursuer—Mr. Walter Oswald, solicitor, Arbroath; for the defenders—Mr. Donald Macintosh, solicitor, Forfar; and Mr. J. S. Butchart, advocate, Aberdeen—the latter of whom also represented the Scottish Employers' Liability and Accident Assurance Company (Limited).

Notes of English, American, and Colonial Cases.

SUCCESSION DUTY.—*Cesser of*—*Duty on letters of administration*—*Succession Duty Act, 1853 (16 and 17 Vict. c. 51), ss. 10 and 41*—*Customs*

and Inland Revenue Act, 1881 (44 Vict. c. 12), ss. 27 and 41.—In 1855, £20,000 was settled upon trust for a husband and wife respectively for life, and after the decease of the survivor for the issue of the marriage who attained twenty-one. There was issue one son, who attained twenty-one, and died intestate in November 1881. The husband, the survivor, took out letters of administration, on which duty at three per cent., under the Customs and Inland Revenue Act, 1881, s. 27, was paid, and claimed the whole fund, contending that, under section 41 of the same Act, no further duty was or would become payable either under the settlement or under the estate of the son,—*Held*, that the wording of section 41 was directly applicable to the present case, and that the father, having paid duty at three per cent., under section 27, on the value of the interest in reversion expectant on his own decease, was not liable to pay any further duty in respect of any succession created by the settlement or under the estate of the son.—*In re Haygarth's Settlement Trusts*, 52 L. J. Rep. Ch. 416.

FIRE INSURANCE.—*Vendor and purchaser*—*Insurance by vendor of house agreed to be sold*—*Loss by fire before completion of purchase*—*Receipt by vendor of both purchase-money and compensation*—*Right of insurance company to benefit of such payment*—*Subrogation*.—The defendants agreed to sell to R. certain land and buildings which they had insured with an insurance company on behalf of which the plaintiff sued. The agreement for sale contained no reference to the insurance. After the date of the agreement for sale, but before the date named for completion, the buildings were damaged by fire, and the defendants, the vendors, received compensation from the insurance company. The purchaser afterwards duly completed the purchase, and paid to the defendants the full amount of the purchase-money. In an action by the insurance company in respect of the amount which they had paid to the defendants as compensation for the loss caused by the fire,—*Held*, that the plaintiff company was entitled to succeed; that a contract of insurance is a contract of full indemnity, and nothing more; that as the defendants had received the full amount of the purchase-money as well as the insurance-money, the plaintiff company was entitled to have brought into the account that which diminished the loss suffered by the defendants, and to obtain the benefit of part of the purchase-money received by them subsequently to the payment by the company of the insurance money.—*Castellain v. Preston*, 52 L. J. Rep. Q.B.D. (App.) 366.

COMPANY.—*Winding-up*—*Jurisdiction*—*Companies Act, 1862, s. 102*—*Contributory*—*Indemnity*.—Under section 102 of the Companies Act, 1862, the Court can only adjust the rights of contributories *inter se*, *qua* contributories.—*In re The Alexandra Palace Co.; ex parte Goodson and Others*, 52 L. J. Rep. Ch. 428.

Where the governing object of a summons by directors was to obtain indemnity from co-contributories, joint tort-feasors, but some matters asked for were within the jurisdiction in the winding-up, the Court refused to make any order.—*Ibid*.

—*Winding-up*—*Rates made subsequently to commencement of winding-up*—*Right of rating authority to payment in full*—*Beneficial occupation*.—The right of a rating authority to payment in full of rates on the property of a company in liquidation made subsequently to the commencement of the winding-up, is not necessarily governed by the same principle as that

of a landlord in respect of rent.—*In re Watson Kipling & Co.*, 52 L. J. Rep. Ch.

In order to entitle the rating authority to payment in full, it must be shown that there has been an actual beneficial occupation or enjoyment of the property by the liquidator on behalf of the company.—*Ibid.*

Where the property of a company in liquidation consisted of chemical and other works and blast furnaces which had ceased to be used for manufacturing purposes or purposes of profit, but the liquidator kept some of the furnaces alight with a view to a sale of the property, and had used part of the works for the storage of plant,—*Held*, that there was no such beneficial occupation or enjoyment of the property by the liquidator as would entitle a rating authority to payment in full of rates made subsequently to the winding-up of the company. *Held*, also, that the Court, in exercising its discretion on the matter, was at liberty to have, and would have regard to the fact that the amount of the rates was excessive.—*Ibid.*

BANKER.—*Shares in bank—Equitable mortgage—Fraud of mortgagor—Banker's lien—Estoppel.*—In January 1878, B. was a customer of and a shareholder in the defendant bank, and was also secretary of a club having an account there. B. fraudulently altered a cheque for £600, drawn by the club in favour of S. or order, by striking out the word "order" and adding the word "bearer," and then induced the bank to place the £600 to the credit of his own account. In November 1878, the plaintiff lent B. £1000 upon the security of the deposit of a share certificate for fifty shares in the bank. The certificate gave the holder thereof notice that the bank had a paramount lien on the shares of any shareholder for whatever might be due from him to the bank. On the 17th of March 1880, the plaintiff gave notice to the bank of the deposit of the certificate, and was told by the bank manager, in answer to his inquiry, that the bank had no claim on the shares. In May 1880, the bank got notice of B.'s fraud. They then settled with the club, debited B.'s account with the £600, which they had paid to him on the irregular cheque, and gave the plaintiff notice that they claimed a lien on the shares for that amount. In an action by the plaintiff claiming a declaration that the shares were subject to his equitable mortgage,—*Held*, that the bank, on discovering B.'s fraud, were entitled to set the account right as between themselves and him, by debiting him with the amount of the cheque. *Held* also, that as the plaintiff was in no way prejudiced by the statement made by the bank manager on the 17th of March 1880, the bank were not estopped from setting up their lien on the shares; and action dismissed.—*Horsfall v. The Halifax and Huddersfield Union Banking Co.*, 52 L. J. Rep. Ch. 599.

BANKRUPTCY.—*Composition—Small amount of—Security—Registration of resolutions—Bankruptcy Act, 1869 (32 and 33 Vict c. 71), s. 126—Bankruptcy rules 1870, rule 295.*—Where a meeting of creditors resolved to accept a composition of 1s. in the pound,—*Held*, that the smallness of the sum was not of itself evidence that the resolution was not passed *bona fide*, that is, in the interests of the creditors and not for the benefit of the debtor; and the composition being secured by a third person, the resolution was ordered to be registered. The true meaning of the Bankruptcy Act is that in all such cases the arrangement must be one which

the creditors acting *bona fide* can accept.—*Ex parte Hudson; in re Walton* (App.), 52 L. J. Rep. Ch. 584.

BANKRUPTCY.—*Debtor's summons—Dismissal—Legal or equitable defence to action—Bankruptcy Act, 1869 (32 and 33 Vict. c. 71), s. 7*].—Unless a debt is exigible it will not support a debtor's summons under section 7 of the Bankruptcy Act, 1869; if the debtor would have any legal or equitable defence to an action for the debt, the summons ought to be dismissed.—*Ex parte Foster; in re Foster* (App.) 52 L. J. Rep. Ch. 577.

H. was a creditor of F. & Co., who, being in difficulties, summoned a private meeting of their creditors. The meeting was attended by nineteen out of twenty-seven creditors, whose debts amounted to £2400, out of a total of £2628. A resolution was passed by the meeting, and signed by the chairman, that the debtors' estate and effects should be assigned to trustees for the benefit of the creditors. In pursuance of this resolution, the debtors gave up possession of their property to the trustees nominated by the meeting; but the deed of assignment, although prepared, was never executed. H. was present at the meeting, and assented to the resolution,—*Held*, that the resolution did not constitute a binding agreement; but that it was only a preliminary step, intended to be binding if the deed was executed by all the creditors, which had not been done; and that H. was not therefore precluded from issuing a debtor's summons for the amount of his debt.—*Ibid*.

—*Liquidation—Adjudication—Bankruptcy Act, 1869 (32 and 33 Vict. c. 71), s. 125, sub-s. 12*].—The Court has power, under section 125, sub-section 12, of the Bankruptcy Act, 1869, to make an adjudication against a debtor who has filed a petition for liquidation, even though the creditors have passed no resolutions for liquidation by arrangement or composition.—*Ex parte Walker; in re M'Henry* (App.) 52 L. J. Rep. Ch. 653.

—*Trustee—Assignment by trader of future receipts of business—Bankruptcy of trader—Title of trustee—Bankruptcy Act, 1869 (32 and 33 Vict. c. 71), s. 11*].—Where a trader assigned for value the future receipts of his business, and afterwards became bankrupt,—*Held*, that the assignment was invalid as against the trustee in bankruptcy as regarded the receipts which had accrued since the commencement of the bankruptcy.—*Ex parte Nichols; in re Jones* (App.), 52 L. J. Rep. Ch. 635.

COMPANY.—*Winding-up—Practice—Appeal—Security for costs.*—Where a company, which has been ordered to be wound up on the ground that it is unable to pay its debts, is the sole appellant from the winding-up order, security for the costs of the appeal must be given.—*In re The Photographic Artists' Co-operative Co. (Lim.)*, (App.), 52 L. J. Rep. Ch. 654.

—*Winding-up—Practice—Misfeasance by directors—Affidavit by official liquidator embracing distinct cases against different directors—Right to compel official liquidator to make affidavit of documents—Companies Act, 1862, s. 165.*—In the winding-up of a company the official liquidator took out a summons, under section 165 of the Companies Act, 1862, against a number of persons who were or had been directors, seeking to make them responsible for certain alleged acts of misfeasance, which were 107 in number. In support of his application he filed a long affidavit

embracing the cases of all the directors. E. had been a director for a short period only, and the liquidator only sought to make him liable for 11 out of the 107 acts of misfeasance. E. appeared by a separate solicitor, and applied for an order upon the liquidator to state the particular paragraphs of the affidavit on which he intended to rely as against him,—*Held* (affirming the decision of CHITTY, J.), that the application must be refused, on the ground that there were no special circumstances to take the case out of the general rule that a defendant must ascertain for himself what part of his opponent's evidence relates to him.—*In re The Mutual Society* (App.), 52 L. J. Rep. Ch. 621.

An official liquidator is not in the position of an ordinary litigant; he is an officer of the Court, and will not, except under special circumstances, be ordered to make the usual affidavit as to documents, although he is bound to show a hostile litigant all the documents in his possession on which he relies or which the litigant desires to see.—*Ibid.*

COSTS.—*Security for—Time to apply—Limited Company plaintiff—Companies Act, 1862, s. 69—Rules of Court, 1875, Order LV. rule 2.*—Under Rules of Court, 1875, Order LV. rule 2, the Court has a judicial discretion to direct security for costs to be given at any time,—*Held*, therefore, that in a proper case, the Court will order security for costs to be given on an application made by a defendant, even after notice of trial.—*The Lydney and Wigpool Iron Ore Company (Limited) v. Bird*, 52 L. J. Rep. Ch. 640.

HUSBAND AND WIFE.—*Life assurance—Policy effected by husband "for the benefit of his wife and children"—Married Women's Property Act, 1870 (33 and 34 Vict. c. 93), s. 10—Married Women's Property Act, 1882 (45 and 46 Vict. c. 75), s. 11—"Separate use"—Form of order.*—A husband having, under the Married Women's Property Act, 1870, s. 10, effected a policy of assurance on his own life, "for the benefit of his wife and the children of their marriage," died insolvent. The wife and one of the children of the assured predeceased him. A petition under the Act having been presented by the surviving children for the appointment of a trustee to receive the moneys payable under the policy, and for a declaration of the children's rights and interests,—*Held*, that the Court had under the Act no jurisdiction to make the declaration asked for.—*In re Adam's Policy Trusts*, 52 L. J. Rep. Ch. 642.—*In re Mellor's Trusts* (47 Law J. Rep. Chanc. 246; L. Rep. 6 Ch. D. 127; *ibid.* 7 Ch. D. 200) dissented from.—*Ibid.*

Semble, the words "for her separate use" in the Married Women's Property Act, 1870, s. 10, indicate an intention that the wife is to take a life estate; and therefore the effect of the policy, when read together with the Act, was to constitute a trust for the wife for life with remainder to the children as joint tenants.—*Ibid.*

Under the circumstances above mentioned, the Court being of opinion that the trust was either for the wife for life with remainder to the children as joint tenants, or for the wife and children as joint tenants, did not require the legal personal representatives of the deceased wife and child to be served with the petition, but made an order for the appointment of a trustee, prefaced with the opinion of the Court that the wife took no interest, and that the children took as joint tenants.—*Ibid.*

THE JOURNAL OF JURISPRUDENCE.

LEGACIES GIVEN IN A PARTICULAR CHARACTER.

IN a recent number we reviewed several cases on the "Effect of Divorce and Nullity of Marriage on the Character of a Legatee as Husband or Wife." In the present paper we purpose to take a general survey of the subject of which this formed part, considering other characters and other circumstances affecting the possession of the character than those formerly mentioned.

Sometimes no individual is designated as the legatee, nor indeed is any individual intended, but the legacy is given to the person, whoever he may be, who possesses a particular character. In these cases any question which arises is this,—What, taking all things into consideration, is the precise character which it may be supposed was intended by, and was in the mind of the testator? Of this kind was the case of *Bulmore v. Wynter*, L. R. 22 Ch. D. 619, mentioned in our former article. The testator left the income of the residue of his estate to the testator's daughter, and after her death "to any husband with whom she might intermarry, if he should survive her." The daughter married, was divorced, and the husband survived her. She had not married again. What was the character pointed out by this description? Was it "the surviving husband"? Must the person entitled be a husband who survived her as her husband? The Court, taking the parts of the description, "any husband with whom she may intermarry," and "if he survives her," separately, held that it was not necessarily a husband who survived her as her husband. To this view the objection is, that if the lady, after being divorced, had married again, and the second husband survived her, he would have been entitled, or at least would have had as good a claim, to the possession of the character. If the second claimant were to be preferred, this shows that the character was one that never was possessed by the actual claimant, the husband who survived her but not as her

husband. If the second claimant were equally entitled as the first to take under the character, this shows that the view of the character which permits this, and under which the actual claimant was allowed to take, was not a sound one, for the character intended was one not applicable to more than one person.

A recent English case illustrates the principle that a person may take under a character although he does not, strictly speaking, answer to the description, provided he possesses the character which the testator may reasonably be supposed to have intended. In *In re Earl of Stamford and Warrington's Estates — Earl of Stamford v. Payne*, July 31, 1883, the Earl of Stamford and Warrington had devised certain estates to trustees during the life of his wife, in trust for her, subject to a payment out of his Cheshire estates of £8000 a year "to the person who shall for the time being be Earl of Stamford and Warrington." Subject to this disposition, this Cheshire estate was to go to Mr. Harry Grey and his heirs in tail male. On the testator's death, Mr. Harry Grey became Earl of Stamford, but the title of Warrington became extinct, so that there was no person holding the character of Earl of Stamford and Warrington. The £8000 was claimed by Mr. Harry Grey, and Mr. Justice Kay sustained the claim. The late Earl had been twice married, the second marriage had lasted for twelve years, and there were no children by either marriage, so that the very great probability must have been contemplated of his never having a son, in which case the Warrington title fell. But the Court held that the testator must have intended the £8000 a year for somebody, and the person intended must have been the person who succeeded to the title that remained, although the testator should die without issue. In all likelihood, it was said, the testator had forgotten that the dignities were held on different grants. It cannot fail to be noted, however, that the Cheshire estate was left by name to Mr. Harry Grey and his heirs, who would succeed, and who the testator knew would succeed, to the title of Stamford, if the testator left no son. How was it that, if by Stamford and Warrington the testator meant the person who would succeed to any of his titles, he, knowing that Mr. Harry Grey would so succeed, did not leave the annuity of £8000 to him by name also? Does not the mention of Harry Grey in the one case, and Earl of Stamford and Warrington in the other, point to the idea of the possibility of these being different persons? Yet in the theory that prevailed, that by Stamford and Warrington was meant the person who succeeded to the Stamford title alone, these necessarily meant the same person.

The larger class of cases of legacies given in a particular character is where an individual is pointed out by name, and a character or description, as husband, wife, etc., is added. Sometimes the addition is merely designative or demonstrative. These cases fall under the general rule as to *falsa demonstratio*, the only question being whether the person is sufficiently identified. These

are not properly cases of bequests in a character, but there is a frequent difficulty in determining whether the case falls within the one category or the other. The cases of bequest to a person in a character proper are where the addition is significant of a motive prompting the gift. The failure of the character does not necessarily involve the failure of the legacy. The question whether the bequest stands or falls depends upon many and varying circumstances, suggestive of varying considerations according as the character has been falsely assumed or erroneously attributed or supposed to be possessed, or as it is to be regarded as the sole motive of the bounty, or, to express it more accurately, the motive in the absence of which the gift would not have been made, or as merely indicative of a larger motive which may subsist, although the special quality or character in which the bequest is given fails.

It is to the first of these two classes of cases, the cases where the addition is merely designative, that the old maxim applies: *Veritas nominis tollit errorem demonstrationis*, of which this example is given in Lord Bacon's *Maxims of the Law*: "So if I grant land *Episcopo nunc Londinensi, qui me erudivit in pueritia*, this is a good grant, although he never instructed me." Such a maxim as this gives no help in determining whether the case falls within the category of character or of mere description. Nor is the rule by any means absolute, even in regard to description. As is said by Mr. Justice Maule in *Gains v. Rouse*, 17 L. J. (C. P.) 108: "This rule, which used to be most strictly applied, has been relaxed in modern times when it can be shown from what appears on the face of the will itself that the plaintiff meant another and a different person from the person named in the will; the reason is in order that the real intention of the testator may be carried out."

There are some texts in the Roman law as to the effect of a false description, the opposite opinions given in which are due to their being directed sometimes to the one, sometimes to the other, of the two different cases we have mentioned,—the description when it is merely a designation indicative of the person, and when it is a character indicating the motive of the bounty. To the first class we may refer this: "*Falsa demonstratio neque legatario neque fides commissario nocet, neque herede instituto, veluti si fratrem dixerit, vel sororem, vel nepotem, vel quodlibet aliud*," D. xxxv. 1. 33. More pertinent to the cases we have to deal with is this: "*Falsam causam legato non obesse verius est; quia ratio legandi legato non cohærat; sed plerumque doli exceptio locum habebit si probetur alias legaturus non fuisse*," D. xxxv. 1. 72, s. 6. The meaning of which is, says Lord Alvanley in *Kennell v. Abbott*, "That a false reason given for the legacy is not of itself sufficient to destroy it; but there must be an exception of any fraud practised, from which it may be presumed the person giving the legacy

would not, if that fraud had been known to him, have given it." In C. vi. 42. 27 we have this passage: "Fidei commissum ejus qui reliquerat pœnitentia probata successores nunquam præstare compelluntur," which Swinburne (p. 557) interprets as stating that "the legacy falls, though the testator were ignorant of the injury done to him by the legatary, when it is such for which it is very likely the testator would have revoked the legacy." In C. vi. 24. 4 this is laid down as to the case of a legacy to one falsely believed by the testator to be his son: "Si pater tuus quasi filium suum heredem instituit, quem falsa opinione ductus suum esse credebatur, non instituerit si alienum esse nosset, isque postea subditus esse ostensus est auferendam ei successionem divorum Severi et Antonini placitis continetur." Founding on this, it is said in Merlin's *Repertoire de Jurisprudence*, art. *Legs*, ii. 2. 4: "La fausse démonstration pourrait cependant emporter la nullité du Legs, si elle avait sa source dans une erreur du testateur, et s'il existait de fortes raisons de croire que celui-ci aurait disposé autrement dans le cas où il eût mieux instruit." And following Voet, a supposed discrepancy in the dicta of the Roman jurists is thus explained: "Il faut distinguer le cas où le testateur a appelé son fils ou son frère, un légataire qu'il savait bien n'être point tel, et qu'il aimait néanmoins comme s'il eût été réellement, d'avec celui où trompé par de fausses apparences, il a regardé et gratifié comme son fils ou son frère, une personne qui n'avait point cette qualité, et qu'il aurait passée sous silence, s'il avait su qu'elle lui étrangère." In Swinburne *On Wills* it is said, p. 894: "When the testator doth err in the quality of the executor or legatary, this error is not hurtful unless that quality were the final cause wherefore the testator made him executor or legatary, for the error in such a quality doth make void the disposition; for example, the testator saith, I make my cousin John at Stile my executor, or, I give to my cousin John at Stile an hundred pounds; in this case, if John at Stile be not cousin to the testator, he cannot obtain the executorship or legacy. . . . Although it be written that a false demonstration, or false cause, doth not hurt the disposition, yet that is to be understood where the testator doth not ignorantly, but wittingly, express the same." The case of a false demonstration or character is cognate to that of a false cause, but the cases are not quite the same. The rule as to *falsa causa* has been often laid down, and the reason stated is that "the cause or reason for granting a legacy is not essential to the legacy, and therefore the unnecessary mention of a cause ought to be no obstruction to its validity," Erskine, i. 3. 9. 8. But it cannot be said that where a legacy is given to a person *in* a particular character, the mention of that character is unnecessary. Nor indeed is the reason given for the rule as to false cause a very satisfactory one. The mention of a cause may be unnecessary; but it does not follow from this that its existence is unnecessary when it is mentioned. The

sealing of a deed is with us an unnecessary formality, but it is necessary that it should be sealed when it is mentioned that it is sealed. In like manner, the mention of a cause, it may be said, has made its existence necessary. Probably the rule as to false cause should be understood in this sense, that the legacy does not fall though the cause assigned is false, because there may be other causes. It seems to us that the fair rule, both as to cause and as to character, is this, that the legacy stands or falls according as the cause or the character appears to be or not to be one but for which the legacy would not have been given.

Where the particular character in which the legacy is given has been falsely assumed by the person claiming it, the legacy is void. The leading case on this subject is *Kennell v. Abbott*, 4 Ves. jun. 809. The testatrix left a legacy to "my husband, E. L." At the time of the marriage he was the husband of another woman, but had passed himself off as an unmarried man. The testatrix was unaware, and remained unaware, of his real position. Lord Alvanley said: "Upon general principles I am of opinion it would be a violation of every rule that ought to prevail as to the intention of a deceased person, if I should permit a man, availing himself of that character of husband of the testatrix, and to whom in that character the legacy is given, to take any part of the estate of a person whom he so grossly abused, and who must be taken to have acted upon the duty imposed upon her in that relative character. . . . This is a legacy to her supposed husband, and under that name. He was the husband of another person. He had certainly done this lady the grossest injury a man can do to a woman; and I am called upon now to determine whether the law of England will permit this legacy to be claimed by him. Under these circumstances I am warranted in making a precedent, and to determine that wherever a legacy is given to a person under a particular character which he has falsely assumed, and which alone can be supposed to be the motive of the bounty, the law will not permit him to avail himself of it, and therefore he cannot demand his legacy." The same principle, which is in truth the principle that what is based upon fraud is voidable, was given effect to in the previous case of *Ex parte Wallop*, 4 Bro. C. C. A woman induced the man with whom she had cohabited to believe that she had several children to him, and had shown him children as his which were not his nor even hers. He left legacies to them as her children by him. These legacies were held void. "There were," says Lord Alvanley, commenting on this case in *Kennell v. Abbott*, "two things wanting. The testator was not merely deceived as to their being his children, but he was deceived as to the other ingredient of the character in which he gave them the legacies, for they were not the children of that woman." Lord Alvanley takes care to draw a distinction between such a case as that in *Kennell v. Abbott* and one where the character has been falsely attributed to the legatee through no fault of the legatee

after, before the intended marriage took place. The lady was held entitled to the bequest. Vice-Chancellor Shadwell said: "The legacy given to the plaintiff is not given on condition of the testator marrying her. He made his will under the impression that his intended marriage with the plaintiff would take effect; he has described the plaintiff with reference to his intention of marrying her."

Even where the testator was not aware that the character strictly speaking was not really possessed, but the error in supposing that it was, was not due to any fault of the legatee, and a position was occupied similar to that erroneously attributed, the legacy has been held good. In the case of *In re Petts* (1859), 27 Beav. 576, reported under the title of *In re Pitts's Will*, 5 Jur. N. S. 1235, the woman to whom the legacy was left as the wife of the testator, and with whom she had lived as his wife, had at the time the ceremony of marriage was gone through a husband living. She had been separated for many years from this husband, and she stated that she had understood that he was dead. The testator was aware of this former marriage, and of the want of certain evidence of the husband's death. The legacy was held good. Lord Romilly observed: "I am of opinion that the evidence before me does not show anything which amounts to fraud on the part of the legatee. The inquiries as to the existence of the first husband may have been loose and not very carefully prosecuted, either by the testator or the claimant" the supposed wife. "She had left her husband for nineteen years; he made no attempt to recover her; and having heard nothing of him, she married again. After that lapse of time, I do not think that the going through the ceremony of marriage with another husband can of itself be considered as so fraudulent an act as to deprive her of this legacy. I think the testator intended to benefit this person whom he designated as, and thought to be, his wife, and I do not think she has done any act to forfeit it." In *Giles v. Giles* (1836), 1 Keen 685, the testator left a legacy to "my wife A. G." At the time the ceremony of marriage was gone through the woman had a husband living. Both parties knew that he was alive two years before. The parties had lived together as man and wife, and had been recognised as such up till the testator's death. The legacy was held good. Lord Langdale, M.R., said: "I cannot assume from the facts of the case that the plaintiff had a guilty knowledge which the testator had not in common with the plaintiff. . . . If both had a guilty knowledge, there was no fraud committed upon the plaintiff." In *Meluish v. Milton*, L. R. 3 Ch. D. 27, a testator left his property to his "dear wife," describing her by name. She had been married many years before, separated from her husband, then married another, after whose death she married the testator, the first husband being still alive. On the evidence, Hall, V.C., held the bequest good: "I think it is

impossible not to conclude upon the evidence that the question of this lady being or not being a married woman was previously to the ceremony of marriage being gone through between her and the testator matter of consideration between them. She had been living for a number of years as the wife of a friend of his, and he had known her in that character; he desired to marry her, and the question whether the first husband was still living was discussed. . . . The testator must have gone through the ceremony of marriage with the knowledge that it was not certain whether the first husband was living or dead, and when after this the parties had lived together as man and wife for some time, I do not think it would be safe to consider that the character of lawful wife was the motive, and, as Lord Cottenham says, 'the only motive for the gift.' A man who under these circumstances was living with a woman as his wife might very well intend that the property should go to her although she in fact might turn out not to be his lawful wife. I cannot consider that in that state of circumstance the case is brought within the case of *Kennell v. Abbott*."

These cases are illustrations of the principle of what is laid down in the Pandects: "Qui frater non est, si fraterna caritate diligitur recte cum nomine suo sub appellatione fratris hæres instituitur," D. 28, 5, 58, § 1. It is on the same principle that the opinion of Lord Alvanley must rest, when he says, in the passage quoted *supra* from *Kennell v. Abbott*, that a legacy to a child described as the son of the testator, whom the testator thought his son, who was not so, but for whom the testator had shown a personal affection, would be a good legacy.

But in order to give one who is only a reputed wife right to a legacy to a "wife," there must be evidence that the testator treated her as a wife in the knowledge that she was only a reputed wife, assuming that her true status was known to herself. In the case of *In re Davenport's Trust* (1852), 1 Sm. and G. 126, a legacy was given to a nephew, G. C. D., and "after his decease to the said G. C. D.'s wife, should she survive him." G. C. D. died unmarried, but had lived with, and had children by, a woman whom he treated as his wife. There was evidence that this woman had always been reputed to be, and received by the members of the testator's family as, the wife of the nephew, and that as such reputed wife she had visited some of them. As for the testator's knowledge, all that was proved was that he had alluded to his nephew as having a wife and children. The woman was held not entitled to the legacy. Vice-Chancellor Stuart said: "I am unable to hold that these words amount to a gift by description. Upon the evidence there is nothing to indicate that this lady was personally known to the testator, or known to him in such a way as to lead to the inference that she was intended when he refers to his said nephew's wife, or to justify the Court in arriving at the

conclusion that no other person but this lady was in the mind of the testator when he framed this gift. . . . Suppose the nephew had survived the testator, and had married and afterwards died, there would in that case be in existence a person exactly answering in every respect to the lady described in the will, viz. the nephew's wife. Could there be any doubt that under these circumstances that wife would be entitled to the legacy? Under the construction I am invited to put upon this will, I should be bound to declare that the wife of G. C. D. did not answer to the description contained in the will, but that this lady, who, it is conceded, is not the wife of the testator's nephew, is accurately described as his wife."

(To be continued.)

STATISTICS OF CRIME IN PORTUGAL

THE criminal statistics of all countries are of interest to the social observer. They note the proportion of crime to the population, the classes from which the criminal ranks are mainly recruited, the effect of education in repressing criminal tendencies, the proportion of criminals who are so by profession to those who have been led into a single act of crime, the effect of the relaxation or the increased severity of punishments in repressing crime, and what is of great interest, the kinds of crime to which the inhabitants of different countries are peculiarly prone. Reading the criminal statistics of other countries in connection with our own, we have the materials of a larger induction and the opportunity of arriving at a surer result; and, besides, we are enabled to note many interesting points of similarity and dissimilarity, and facts illustrating the influence of race, creed, and social institutions. The Portuguese Government recently issued a volume of criminal statistics for Portugal and the islands, a summary of which, prepared by Mr. Baring of the Embassy at Lisbon, is to be found in one of the parliamentary papers of last session.

In 1879, the year for which these statistics are taken, the number of crimes tried before the Portuguese tribunals was 9267, showing a decrease of 1205 on the numbers of the preceding year. The number of persons tried was 12,497. The population of Portugal and the islands in 1878 (and the number would be little different in 1879) being 4,550,000, the persons tried were 0·27 per cent. of the total population. In the same year 1879, in France, it is stated, the number of persons tried was 0·51 per cent. of the population. It is impossible from such returns to draw any comparison of the amount of crime in the different countries, unless we know what classes of crime are included in them. It is obvious from the number, and from the absence of such entries as "drunkenness" in the category of offences, that police court offences are not

ranked among the crimes charged in these 9247 cases. At the same time it is obvious that some very minor offences are taken into account before this very large number of upwards of 9000 is reached. In the list we have some very vaguely described offences, such as "resistance to constituted authorities," which amounts to one-fourteenth of the whole; and, judging from the name, it is probable that many of these would with us rank merely as police court cases.

The number of persons tried is hardly to be taken as a criterion of the number of criminals in a country, unless we take it for granted that every person accused is guilty. But the number of acquittals is indicative of the state of the criminal administration. The number of acquittals in Portugal is abnormally large, being in the year for which the returns are given 4367 out of the 12,497, or 34·94 per cent. The proportion of acquittals was 2·40 per cent. less than in 1878; but it was still much higher than the proportion in many, if not most, of the European States. In France the average proportion of acquittals to cases tried is, it is stated, 20, in Italy 24, in Spain 26, in Belgium 28, and in England 29 per cent. [In England it was in 1881 only 23 per cent.] A high proportion of acquittals shows something amiss in the administration of justice. Either a great many people are accused who should not have been accused, or a great many people are let off who should not have been let off. The high proportion in Portugal, more than one-third of the persons tried, says the compiler of this volume of statistics issued by the Portuguese Government, "threatens the whole social fabric with grave dangers;" and he adduces various reasons to account for it. Among these are the excessive severity with which the Portuguese law punishes certain crimes. This is a curious remark to be made in an official paper. Another cause is the excessive leniency of juries. These two causes run very much into one another. In every country where there is trial by jury, we find that where the penalty for the offence is excessive, and still more when something is punished as a crime which the popular understanding refuses to accept as such, the mind of juries revolts against the law, and they refuse to convict. In England, when theft was punished with death, juries refused point blank to convict when the charge was an inconsiderable one, however clear the evidence might be. A similar thing happened when they were told that it was not for the jury to determine whether an article or speech was of a libellous character. Another cause alleged is "the want of legal proofs to support charges brought." This involves a censure on the prosecution. Charges ought not to be brought to trial if legal proof to support them is wanting.

The different kinds of crime which figure in the lists of crime in various countries are of special interest, and bring out in a marked degree the characteristics of different races. The 9200 cases are distributed into four classes. Offences against the State and public

order figure for 2300, or 25 per cent. ; against property, 2100, or 23 per cent. ; against the person, 4800, or 52 per cent. Offences against religion, which include blasphemy, amount only to fifteen cases in all, in which there were twenty-four persons tried, only half of whom were convicted.

The influence of the fiery southern blood is discernible in the item which heads the list in point of numbers—cutting and wounding, 1737 cases. Another item is significant of the same class of passions and habits, “wearing and using forbidden arms,” 290. Next to “cutting and wounding” come assaults, with 1581 cases. Next to these is theft, with 1344 cases. Burglary figures for 220 cases. Robbery has not a separate entry, but whether it is included in theft or in assault is not stated. “Outrages on public morality” amount to 431, but what is included under this rather vague title is not indicated. Whatever it is, it is something different from “outrages on public decency,” for that is entered separately at 31 cases ; nor seduction, for which 48 persons were tried, of whom 29 were acquitted,—juries in Portugal being evidently of opinion that charges of this kind are very easily made. Nor is it adultery, which is in Portugal esteemed a crime in reality, and not as in Scotland, only so in name. It is pleasing to find that in Portugal, with its four and a half millions of inhabitants, there was only one case of adultery, and in that case only one person committed, or at least was charged with committing, the offence. Malicious injuries figure for 350 cases. Of manslaughter there are 26 cases, of homicide 121, and of infanticide 19. Capital punishment was abolished in Portugal in 1867, and the writer of the summary states that the abolition had not led to an increase in homicidal crime. Previous to 1867 the number of murders never fell below 140, and, as we have seen, in the year for which the statistics are given the number fell to 121. Under the former law 20 of these would have been punishable with death. These 20 cases are curiously distributed in the statement in the report:—12, premeditated homicide ; 4, poisoning, which one would have thought premeditated homicide if anything was ; 3, robberies with murder ; 1, parricide. In these 20 cases there were 23 culprits, of whom 18 were men and 5 were women. Besides the cases of infanticide, there are 46 cases of exposing and abandoning infant children. Infanticide had slightly increased, and it is thought this increase may possibly have arisen from the suppression of the “rodas.” It had been the custom of the Foundling Hospital to take in children left at the door in boxes called “rodas.” In 1879 these “rodas” were suppressed, and children were only taken in after inquiries had been made. Authority seems to be at a discount in Portugal, judging from the 625 cases of “disobedience to constituted authority,” the 356 cases of “insulting and threatening authorities,” and the 116 cases of “resistance to authority.” The last of these three classes appears to be resistance accompanied

by violence; but no information is given as to what precise class of offences is covered by each of these classes, or what is the precise distinction between them. The propensities of the populace are indicated by the items of vagrancy 198 cases, begging 10, illegal gambling 63, unauthorized lotteries 177, smuggling 50, and evasion of customs' duties 90. Among political and State offences we have these—"desertion of office," 2; "abuse of authority," 28; "abuse of the liberty of the press," 3; "interference with the exercise of political rights," 7. There are some remarkable items in the list of offences. "Disorderly order," 6; but what kind of order is disorderly is not indicated. Then we have "illegal disguises," 4; "using assumed names," 9 (on which we may remark that if this were a crime in this country, half of the members of the theatrical profession would be in jail); "illegal emigration," 9; "illegally detaining and confining," 1; "detaining and confining persons under age," 4; "forcible entry of domicile," 25; "removing landmarks," 12; "illegally taking possession of real property," 2. Libel and slander are crimes in Portugal, and it seems to be a frequent offence, seeing that it figures for no less than 667 cases; a very large number, especially considering that there was no general election in the year for which the statistics are given.

Of the 12,497 persons tried, 10,515, or 84·13 per cent., were males, and 1982, or 15·85, were females. 5159 males and 1094 females were tried for assaults and other acts of violence; 2928 males and 251 females for offences against public order; and 2405 males and only 136 females for offences against property. As regards age, 4157 persons were between 20 and 30, 2980 between 30 and 40, and 1989 between 40 and 50. For some wise purpose, no doubt, a statement is given of the numbers of the persons tried according to their status as married or unmarried. The unmarried rather exceed the married (including those who had been married); but deducting from the former those who are too young to be married, we find the proportions of married and unmarried about equal; consequently we have no certain evidence as to the effect of marriage upon crime. As regards the effect of education upon crime, it appears that the number of criminals able to read was 30 per cent., and of those unable 68 per cent. of the whole. Deducting from the total population children under 10 years of age who may fairly be classed as illiterates, and who do not furnish any considerable proportion of criminals, it is calculated that the illiterate criminals amount to 0·31 of the illiterate population, while the criminals able to read amount to 0·48 of the literate population. Of the various classes who contribute to the criminal ranks, the class of agricultural labourers (among whom are included all cultivators of the soil excepting proprietors, gardeners, shepherds, woodmen, day-labourers, etc.) furnish the largest quota, amounting to 40 per cent. Next come

the industrial class (artisans and so on), $37\frac{1}{2}$ per cent. Then follow proprietors $8\frac{1}{2}$ per cent., and the commercial classes $4\frac{1}{2}$ per cent.

The tardy pace of Portuguese justice is made manifest by this fact, that only 73·10 of the cases tried were for offences committed during that year, and that of the rest, in 426 cases the crime was committed before the previous year. The number of habitual criminals seems to be small in Portugal as compared with other countries, being only 18 per cent., while according to the statement of the writer of the summary it was in Denmark 26, in England 36, in Sweden 42, in Belgium 45, in France 50, in Russia 57, and in Austria 59 per cent.

The punishments are divided into two classes, — “*penas maiores*” and “*penas correccionaes*.” The former consist in penal servitude in chains for life, or penal servitude for periods varying from three to fifteen years; imprisonment with or without hard labour in a convict establishment or fortress; transportation to a colony; expulsion from the country for life, or for a period of from three to fifteen years, and loss of political rights. The latter, “*penas correccionaes*,” consist in imprisonment without hard labour, and in an ordinary jail, for not more than three years; obligatory residence in some place in Portuguese territory designated by the authorities; temporary deprivation of political rights; fine, and judicial censure. Out of 8130 persons convicted in 1879, only 312 were sentenced to “*penas maiores*.”

PRISONERS' DECLARATIONS.

IN the course of a trial for theft by housebreaking at the last Stirling Circuit, the following passage, illustrative of one of the anomalies of our criminal law, occurred between the Bench and the Advocate-Depute who was conducting the case for the Crown:—

The *Advocate-Depute*—“That’s my case, my Lord, except the prisoners’ declarations.”

Lord Craighill—“And do you wish these read?”

A.-D.—“Yes, my Lord.”

Lord C.—“But are you asking that for yourself, or on behalf of some one else?”

A.-D.—“I am asking it, my Lord, in justice to the prisoners.”

Lord C.—“But the declarations are not evidence in favour of the prisoners. You propose on their account to read to the jury these declarations which I am bound to tell the jury are not evidence on the prisoners’ behalf.”

A.-D.—“In that view, my Lord, I do not press the matter further, as I do not require the declarations for my own case.”

Accordingly the declarations were not read.

Now the procedure here adopted was certainly an innovation upon the practice which has for many years invariably been followed in criminal trials before the Court of Justiciary. It is quite true that neither the prisoner nor his counsel have any right to insist upon having the declaration read to the jury, but hitherto it has been enough that either of them should indicate to the prosecuting counsel a desire to have this done. No Crown counsel within our experience has ever been guilty of the discourtesy and the injustice of refusing this request, and few Crown counsel would care to face a jury after doing so.

Further, although no doubt Lord Craighill was strictly accurate in saying that the prisoner's declaration is not evidence in his favour, it is his sole opportunity for suggesting to the jury an explanation of his conduct consistent with his innocence. Such an explanation comes with ten times greater effect when it has been made by the prisoner himself immediately upon his apprehension, than when it is only first presented in the form of an ingenious theory by his counsel at the trial. We have no hesitation in saying that we have more than once seen prisoners acquitted who would certainly have been convicted but for their declarations. The fact is, that the law which gives to the Crown counsel the discretion of determining whether or not the prisoner's declaration shall be read, is a survival from those cruel days, when every presumption of law and every rule of procedure were conceived in a spirit hostile to the prisoner. The present state of the law is a relic of barbarism, the prosecutor's right is a legacy from a barbarous system, and the fact that the Bench should concuss an unwilling prosecutor into an exercise of that right proves that the traditions and the spirit of that barbarous system are not yet wholly extinct.

The truth is, if we look a little more fully into the matter, that it is really very doubtful whether the prosecutor should have even the right to use the prisoner's declaration as evidence against him. No sooner is a prisoner apprehended, than, without having had any opportunity of consulting an agent, he is invited, or, as we fear, too often is concussed to make a declaration to be used against him if it tells in that direction, not to be used at all, so at all events says the strict letter of the law, if its import be in the prisoner's favour. The result is that prisoners are often induced to make damaging admissions, and still more frequently damaging denials. For example, A, a previously convicted thief, is charged with having committed a theft at the Queen Street Station, Glasgow. Now, as a matter of fact, A, although present at the station at the time when the theft was committed, is wholly innocent of any share in the crime. But when he comes to be interrogated as to his whereabouts at the time, naturally enough he thinks, "If I say that I was there at that time, why, then it will be all up with me;" and accordingly he depones that at the time of the theft he was at Cowcaddens. It comes out, however,

quite clearly in evidence that on the occasion libelled A was actually in the Queen Street Station, and naturally enough his previous denial of that fact makes a most unfavourable impression upon the jury indeed, with some slight corroboration, as, for example, money corresponding in kind to the property stolen having been found on the prisoner's person, it would probably, before a Glasgow jury, be quite enough to send a man into penal servitude for a number of years. Such a case illustrates the hardship which may result from pressing a declaration against a prisoner; and it may, we think, fairly be argued that if the authorities cannot prove an offence without the assistance of the prisoner, no conviction ought to follow. A man, if he subsequently change his mind and plead not guilty, cannot be convicted of a crime solely on his own confession, however frankly and fully that may have been made; and the logical result of this would seem to be, that any unguarded statements a prisoner may make tending to incriminate him ought not to be used to bolster up a weak case. We do not, however, propose here to discuss at any greater length the general question of prisoners' declarations. Our object in making these remarks was to call attention to the infringement of a custom by which, through the courtesy and the sense of fairness of Crown counsel, the ends of justice are secured as fully as is consistent with the present state of the law. It is an anachronism that the prosecutor should have a right to gag the prisoner; and with deference, it seems a pity that the Bench should have thought it wise to compel the prosecutor to exercise that right.

THE COURT OF SESSION IN 1819 AND 1820.

BY A PARLIAMENT HOUSE CLERK OF THAT PERIOD.

THIRD ARTICLE.

THERE existed a small but elegant hall in the middle of the Square appropriated to the Court of Exchequer, now changed into official chambers. This court was formed under the Treaty of Union, with four barons and a chief. It was conducted much under English formulæ, and had upon the clerk's table the chequered or damboard cloth memorial of the strange mode of accounting in ancient times. This court had terms and sessions of its own. It had a golden mace, which is still used in the First Division of the Court of Session. It had only two attorneys, Henry Mackenzie, known as the "Man of Feeling," because of a celebrated literary production of his of that name. He was always retained for the Crown, and therefore, by those who fell under the lash of revenue statutes, was considered to be a man of *no feeling*. Mr. Mackenzie was father of the distinguished Lord Mackenzie, the first of the title. The only other attorney was Mr. Taylor, who entered appearance for the

defendants. Seldom indeed did a formal trial take place. Generally the two attorneys compromised the heavy claims of the revenue, and on a jury being impannelled a verdict was given of consent for a certain modified amount of penalty. The barons had also the issue of Crown charters, and on certain days a writer to the signet appeared reading the old charter compared by one of the barons with the new issue. On these occasions the writer appeared with a gown. Those in large practice had robes for themselves, but otherwise a loan of an advocate's gown was obtained. On such occasions it was not surprising that a limited female audience was noticed. The Exchequer Court for some time was used by the Jury Court, but was found much too small and inconvenient, and therefore a thorough transformation of the whole buildings, with the exception of the Outer House, became necessary.

The Justiciary Circuit Courts, especially that for Glasgow and Perth, had much business to transact, in addition to frequent appeals on civil causes whose value did not exceed £25, but now abolished. As many as fifty appeals were heard at one circuit at Glasgow. Criminal trials by jury before the Sheriff were then very rare, as the whole evidence had to be engrossed verbatim. At that period railways did not exist, and hence the pomp which the judges of assize entered the circuit towns was very great, being met by the civic magistracy a mile outside the burgh, and their arrival was announced by peals of bells. The Northern Circuit was uniformly arranged, so that in spring it commenced at Perth, the days lengthening until the circuit closed at Inverness. The Autumn Circuit had its order reversed, commencing at Inverness, and proceeding to the south as the days decreased in length. In some circuit towns there was usually a circuit assembly, especially at Dumfries. Lord Hermand was a great favourite with the junior bar, who generally flocked to his circuit tour. He was in use to play cards at these assemblies, and many a racy anecdote was recorded of what fell from him at these meetings. Lord Hermand took every occasion on the bench to abuse modern Acts of Parliament, contrasting them with the phraseology of the brief Scotch Acts. Not unfrequently, when an ambiguous modern Act was discussed before him, he exclaimed: "I do not give a farthing for any Act of Parliament which is inconsistent with sound common sense, and is not expressed in plain English." On such occasions he became very animated, and saliva, escaping from his mouth, alighted on the heads of the clerks seated at the table underneath. This jocularly, but not very reverently, was called "Hermon's dew." At this time it was usual to find two or three of the judges of the Court of Session, after the rising of their court, taking their places as elders in the General Assembly of the Church of Scotland, wearing their judicial wigs. It was not uncommon for young advocates to obtain their clerical qualification from some Highland parish, and to sit in the General Assembly. Duncan M'Neill

(afterwards Lord Colonsay) for several years sat as commissioner for the Presbytery of Inveraray. The Assembly was then held in one of the smaller churches of St. Giles'. His Grace the Commissioner held his levee in the Merchants' Hall, Hunter Square, and with little pomp and ceremony, and devoid of military display, walked along the High Street accompanied by his pursebearer and suite to the place of meeting. It was long afterwards, and not until the appointment of Lord Mansfield, that recourse was fully had to the ancient palace of Holyrood with somewhat of the pomp of royalty. It was long the practice for juries to stand whilst charged by the judge, who leisurely read his notes of evidence. Lord Cockburn put a stop to this servile attitude by remarking, "Just stand or sit as best suits yourselves."

Many racy anecdotes were told of Francis Jeffrey. On one occasion a lady of rank annoyed the advocate for aid to institute an action for breach of promise of marriage. She had a series of letters regularly filed which she always carried. Mr. Jeffrey dissuaded her from going to law, as she had no sufficient proof of promise. At last she asked the advocate if he could recommend her to any treatise upon that branch of the law, on which Mr. Jeffrey said that the only commentary he could recommend in such cases was *Darling's Practice*. On another occasion it is said that a pious lady found her friend, Mr. Jeffrey, busily engaged on the Sabbath in reading law papers, and reproved him for desecrating the Sabbath. Mr. Jeffrey promptly replied, "You read in your Bible that it is lawful on the Sabbath day to pull out an ass that has fallen into a pit. Now, I am engaged with a case where a very *great ass* has fallen into a *very deep pit*, and I am endeavouring to extricate the ass from his bondage, which is surely lawful to do at any time." The first case tried in the Jury Court was one of nuisance from a chemical work. This led Mr. John Clerk, with whom the Jury Court was never a favourite, to remark that as the Court had begun *in smoke*, it would end in the same.

Mr. Jeffrey did not frequently appear in the Jury Court, and was not considered to have the ear of the jury. It was stated that he and Mr. Henry Cockburn were at one time engaged in a jury trial. The question was whether a testator was in his right mind at the time of his deed of settlement. Mr. Jeffrey commenced the examination of a rustic in this manner: "Did you consider John to be *compos mentis*, or of weak intellect, or subject to aberration of mind?" The witness answered only with a *glour*. This word as well as *glaur* is peculiar to Scotland. The former is not a mere look, but is a combination of surprise and amazement. The latter word means mud in solution. Mr. Cockburn, seeing the difficulty, came to the rescue, and asked the witness if the *body* (bodie) had anything in him, to which the witness answered, "Nothing but what the *spune put in him*." Mr. Cockburn then asked if he was

not a penny short of the shilling, to which the witness replied, "Ay, more than that—at least tippence." In the end the verdict was in favour of the reduction of the settlement. NESTOR.

REPORT ON SCOTCH PRISONS.

THE fifth annual report of the Prison Commissioners under the Prisons Act, 1877, for the year 1882 has just been issued. By statute the "judicial statistics," both *civil* and criminal, are curiously enough devolved on the Prison Commission. The judicial statistics for 1882 have not yet appeared, as we understand the delay has arisen from the recent severe illness of Mr. Donaldson, to whom this very intricate duty has long been entrusted. We expect to find in the judicial statistics still more ample details of crime in every aspect, which perhaps rendered it unnecessary to have a repetition of the same results appended to the Prison Report. It perhaps might have been well had the Commissioners confined their report to the more *general* details of prisons which fell under their administration, and to the General Prison at Perth, of which they have the sole management, and left all other details and statistics to the forthcoming "judicial statistics." We shall here simply give some of the general details to be found in this report. In all Scotland there exists cellular accommodation for 2870 criminal prisoners and 64 for civil prisoners. During the year 1882 it appears that there was sufficient accommodation throughout the year, and there were admitted to the criminal cells 49,427 persons, and to those appropriated for civil prisoners 93 persons. The number in custody on 31st March 1883 was 2352 criminals and 2 debtors. The daily average throughout the year was 2493 criminal and 9 civil prisoners. At the commencement of the year there were 11 legalized police stations under the administration of the Prison Commissioners, since increased to 12 by the police cells at Dunoon being added to the number of places of confinement for any period not exceeding fourteen days. There have been during the year 1221 persons confined in these cells, the average daily number throughout the year being 20. An allowance is made by the Treasury to the police authorities of one shilling for each prisoner for twenty-four hours for his maintenance, but not to include rent for the cell or services of the officers. As considerable doubts have been entertained as to the advantage of these short imprisonments in small establishments,—long imprisonments in large prisons being the modern practice,—it may be well to give the opinions of the Commissioners on this subject: "In the case of prisoners sentenced to very short terms of imprisonment in default of payment of fines, and prisoners under remand for examination, it saves the time of the police in removing them to a distant prison for a short period, and relieves the Government of the heavy

expense incurred in repeated transmissions. Prisoners of the class usually detained in legalized police cells are not in the proper sense of the term criminals suitable for detention in an ordinary prison, but police offenders for short terms of imprisonment ranging from a few hours to fourteen days for breaches of the general and local Police Acts in default of the payment of fines." These legal police cells have accommodation for 63 males and 31 females—in all, 94. During the year 934 males and 287 females, or in all 1221, have been in confinement; the average daily number has been 14 males and 6 females, or 20 in all.

Including police cells and prisons, there have during the year been in confinement 35,462 males and 17,723 females, or in all 53,185, with 108 male civil prisoners and 2 females—making a daily average throughout the year of criminal prisoners of 1730 males and 783 females, with 9 civil prisoners all males. The Commissioners remark: "Since the passing of the Prisons Act of 1877, which came into operation on April 1, 1878, there has been a continuous and steady decrease in the average daily number of criminal prisoners in confinement, and it has fallen from 3052 for the twelve months ended 31st March 1879, to 2513 in the twelve months ended 31st March 1883."

Male convicts are removed to England immediately after conviction to serve the preliminary period of their sentence before being transferred to a public works prison. Female convicts are detained in the General Prison at Perth during the whole term of their confinement. They are treated in the same manner as female convicts in England, with the exception that the probation period served in separation is 12 months instead of 9. The Commissioners have agreed to this extension of the probationary separate system on the recommendation of the matron, who is of opinion that "the probation period is the time when convicts make most progress in education and are most amenable to discipline. It allows the teacher and Scripture reader to deal personally with each in her own cell, and the convict is led by contact with purer minds to better thoughts preparatory to associating with her fellows." Of female convicts there have been 186 in confinement during the year, giving a daily average of 141.

In the criminal lunatic department a radical change has been made during the year. Formerly a superintendent, who had originally the training of an ordinary asylum attendant, had sole charge; but now that the number of inmates has greatly increased, the medical officer of the prison has been specially made superintendent of this department, the former superintendent being retained as the warder in charge. In this department there have been during the year 64 males and 22 females, in all 86. Only one inmate during the year was placed under mechanical restraint. Lunatics recovered and conditionally liberated are visited twice every year by the medical superintendent, and in addition a report

from their guardians is received on the first of each month. Four inmates died within the year, three from natural causes and one from self-inflicted injuries. Mr. Henry May, the governor, died on the 24th November. Mr. H. A. Monteath, who was deputy-governor to Mr. May, was appointed his successor, but he has also died since the issue of the present report. There were no escapes from any prison during the year, but there were three suicides—one in Stirling Prison, one in that of Aberdeen, and a third in the General Prison, Perth. The lunatic who died, as above mentioned, from “self-inflicted injuries” must certainly rank as a fourth death by suicide.

The report mentions that £6130, 2s. 3d. has been realized as “value of work sold,” and £3593, 4s. as “value of work done for prison use (exclusive of ordinary services of prisoners in cleaning, etc.).”

The prisons of Lanark, Airdrie, Hamilton, Rothesay, and Forfar have been discontinued. The prison at Glasgow has been substituted for the first three named, Greenock for that of Rothesay, and Dundee and Perth Prisons for that of Forfar. At Barlinnie, near Glasgow, a new prison has been erected, or is in progress of erection, consisting of three blocks of 200 cells each. At the commencement of the year the number of prisons in Scotland was 34, at the close reduced to 30, to which the prison at Barlinnie has now to be added. The number of *legalized* police cells is 12. The number of punishments for prison offences was 2666, that on males being 1685, and on females 277. No corporal punishment is inflicted. A table for five years establishes a great decrease of punishments. In the year 1880–81, the table exhibits the number of punishments as 4039, being nearly a half greater than last year. The revenue of the Commissioners, including the Parliamentary grant, is reported at £180,355, 17s. 9d., the discharges at £180,355, 17s. 9d., including the sum of £1184, 12s. 2d. as balance to the credit of the Commissioners.

The report has a voluminous appendix or supplement. First, we have the rules approved by the Secretary of State; then the standing orders and circulars issued by the Prison Commissioners. Then follows the reports of the Government Inspectors, with a variety of tables applicable to each prison, and therefore of no general interest. One table we may notice as very peculiar. It must have occasioned a vast amount of trouble; and although it may be perfectly accurate, as to which there may be doubts, the practical value is not apparent. There are two tables giving the weight of female prisoners, and another table giving the same as to male prisoners. The last table is marked by the Commissioners as “*satisfactory*,” whilst the same satisfaction is not expressed with the table applicable to the softer sex, the reason of which is not apparent. Taking the male “jockey” table, the result is that of 1472 prisoners weighed, 69 obstinately remained “stationary,”

1111 were "gaining," and 292 were "losing." The object seemingly of this avordupois process is to show how the prisoners are fed while in confinement. But we humbly doubt if this can be ascertained by this weighing process. We would require to know, 1st, the previous habits of each prisoner as to his feeding; 2nd, how often put on the weighing-machine, and at what period of the day; and, lastly, the process of digestion must be made known, as it is undoubted that many men "eat to live," whilst others "live to eat."

There are numerous educational tables showing minutely the progress of prisoners in their education, from the deplorable condition of "could not read *at all*" (we doubt the necessity of the last two words), or "could read with difficulty," or "could read well," that is, could read any *common* book *easily*; or with writing, "could not write *at all*," "could sign their name *merely*," "could write *with difficulty*," "could write well," "had a knowledge (?) of arithmetic." We find a very minute table of all the diseases which have been suffered by prisoners, which can only be of use to men of the medical ranks. We are not surprised to find that of 75 various diseases the largest number is under the name of *delirium tremens*, showing the great source leading to crime. One important table sets down the expense of each prisoner in Scotland, and under one column the "*gross cost per prisoner*," and from which we discover the highest cost to be £62, 6s. 9d. at Dingwall, and the lowest £18, 5s. 3d. to be at Glasgow, which forms a strong argument in favour of large prisons. We cannot but admit and admire the great pains and careful manipulation of these minute tables, but we are somewhat doubtful if many of them will ever be read, and though read, they will be thoroughly understood by still fewer.

There are persons who, declaiming against all humane treatment of prisoners, and supposing that deprivation of liberty as no punishment, hold that our prisons are but nurseries of crime. On this we cannot do better than close our notice with the very judicious observations of the Rev. Mr. Baxter, chaplain to the General Prison of Perth, as contained in his report: "The diminution of crime seems to be now pretty fairly established, and may be expected to continue, should there be no abatement in the use of the means to check it. The strict surveillance under which every prisoner is kept by the police when liberated, as well as the activity manifested both in Glasgow and Edinburgh in following criminals to their haunts, and breaking up criminal communities, has made crime more difficult and dangerous. Reformatory and industrial schools have also helped by cutting off the supply at the fountain, and the elevation of the people through the Education Act has been an important factor in the case. There can, however, be no doubt that, in whatever proportion these agencies have been successful, much must be attributed to the strict and stern disci-

pline of the prison, followed up by the hallowed influences of moral and religious truths. Hitherto those who have come here have found that a prison is not a place to be trifled with. They have found, at the same time, every inducement to self-improvement; and where they have evinced any real desire for better things, they have been encouraged by the sympathy of their officers. It would be difficult to wish for any state of feeling towards our unfortunate inmates more satisfactory than that which exists amongst all grades of officers. It is only to be hoped that in the future there will in the outside be no relaxation of repressive measures. Liberated prisoners ought to feel that their criminal ways will not be tolerated; whilst, on the other hand, it should be abundantly clear that sincere efforts to gain an honest livelihood will win for them the approval of all right-minded men. In many cases the softening of the hardest under the influence of religious appeal is witnessed in prison; and it is a great help to all such on leaving to find that they are so hedged in that they cannot go astray without the certainty of detection, whereas when crime is made easy there is a strong temptation which only confirmed habits of well-doing can resist." NESTOR.

DEBT AND DEBTORS.

UNDER the above title we purpose to engage in a brief summary of the legislation of the last few years dealing with the recovery of debts and the control and punishment of debtors. During the period referred to Parliament has been unusually busy with legislation having these objects in view, and much difference of opinion has been expressed as to the success which has attended the labours of our lawgivers. The obscurities of Acts of Parliament have as usual led to litigation, and we will note the cases which have been decided bearing upon the subject of this article. This course of legislation began with the Sheriff Court Act of 1876, 39 and 40 Vict. c. 70—the 26th section of which deals with the process of *cessio bonorum*. Up to 1836 such a process was competent only in the Court of Session, a most unreasonable restriction considering the pecuniary circumstances of the ordinary petitioner. For forty years he had his option of either the supreme or the local tribunal. The most important provision of the Act of 1876 was that which gave to the Sheriff an exclusive jurisdiction. "All such actions shall be instituted in the Sheriff Court only." It further rendered the process of *cessio* competent in slightly different circumstances from those under which formerly it alone could be competently brought. The charge to pay need not have been followed by a warrant to imprison, but fear of imprisonment was still the assumed ground of the application, the debtor having now, however, a right to apply before he actually found himself in the last extremity.

Cessios were described as actions in the Sheriff Court. The new Act gave a new form for Sheriff Court actions, but cessios had hitherto enjoyed the benefit of a form of their own. Hence the question arose what form were they henceforth to take, and the only decision, so far as we are aware, under the 26th section relates to this really insignificant point. Sheriff Wilson, in his *Law of Process*, had laid down that the form of the application was still to be that prescribed by the Act of William the Fourth, and all that can be said for such a view will be found stated in a judgment of Sheriff Bell (*J. of J.* xxii. 325). The Court of Session settled the question once and for all in *Crozier v. Macfarlane & Co.*, June 15, 1878, 5 Ret. 936, when it was held that a petition for *cessio bonorum* being a civil proceeding, competent in the ordinary Sheriff Court, could not be entertained by the Sheriff unless framed in one of the forms prescribed in schedule A annexed to the Sheriff Court Act, 1876. Under this section there was also power given to the Sheriff to grant interim protection at once upon caution being found, and also interim liberation when the petitioner was in prison at the time of making his application. These provisions have now merely a historical interest. The antiquated system of appeals in cessios, under which the judge had to receive reclaiming petitions against his own interlocutor, was abolished, and the process applicable to appeals in other cases introduced. So much for the Act of 1876. The interval which elapsed before cessios were again dealt with by Act of Parliament was short. Much more important changes were introduced by the Debtors (Scotland) Act of 1880. The statute of 1876 had done little beyond altering the form of process. But that which passed four years later, by abolishing imprisonment for debt, would have speedily put an end to most applications for cessio. The fear of imprisonment having been removed, a cessio, except in the case of a limited class of debtors, would have been quite a superfluity, involving trouble and expense without the slightest practical benefit. Hence it was necessary to place in the hands of his creditors the power which hitherto the debtor had alone been able to exert, and enable them to insist upon a cessio of his possessions. The result of this Act also necessitated an amendment in the definition of notour bankruptcy, into which hitherto the conception of imprisonment either as endured or about to be endured had largely entered.

Accordingly, the 6th section of the Act of 1880 provides that "in any case in which, under the provisions of this Act, imprisonment is rendered incompetent, notour bankruptcy shall be constituted by insolvency concurring with a duly executed charge for payment followed by the expiry of ten days of charge without payment, or where a charge is not necessary or not competent, by insolvency concurring with an extracted decree for payment followed by the lapse of ten days intervening prior to execution

without payment having been made." It was further provided that this section should leave unaffected section 7 of the Bankruptcy Act of 1856. Hence the question has been raised, whether the provision of the latter section, rendering it necessary that a charge should be followed by arrestment, poinding, or adjudication, when imprisonment is incompetent, applied to the widely extended class of cases now falling under this category. The Court of Session have held that it does not, *Black v. Watson*, Nov. 29, 1881, 9 Ret. 167. The Lord President said: "It must be observed that the cases in which the charge required to be followed by arrestment, poinding, or adjudication are cases in which, as the law then stood, imprisonment was incompetent or impossible. But the sixth section of the Act of 1880 provides, not for cases in which previous to that Act imprisonment was incompetent or impossible, but to cases in which imprisonment was rendered incompetent by force of the provisions of that Act itself. Therefore the two sections do not deal with the same subject-matter. Cases in which imprisonment is incompetent or impossible, not by reason of the Act of 1880, but on other grounds, will still continue to be regulated by that part of the Act of 1856 which I have read. I apprehend that these provisions of the Act of 1856 remain in full force, and in such cases the expired charge must be followed by arrestment, poinding, or adjudication." To this opinion the judges were driven by the saving clause in the Act of 1880, probably introduced by the framers of the Act, lest, were it absent, some mischief might result. But it is manifestly absurd that a different procedure should be preserved for these two classes of cases—that if, for example, the debt be under £8, 6s. 8d., "arrestment, poinding, or adjudication" must follow before the debtor can become a notour bankrupt.

Sections 7 to 9 deal with the *cessio bonorum*. The most important provision is contained in section 8, which gives to the creditor the power, hitherto possessed by the debtor alone, of initiating the process. The regulations as to notices to creditors, intimation in the *Gazette*, lodging of the debtor's papers, etc., were under section 9 substantially the same as had hitherto existed. But by the 12th section of the Bankruptcy and Cessio (Scotland) Act of 1881, now incorporated with the one which we are considering, it is made lawful for the Sheriff "to appoint any diet of compareance, or any meeting or proceeding under the Cessio Acts, to be held on an induciæ of any number of days not being less than eight." The second sub-section of section 9 has incorporated the provision of section 93 of the Bankruptcy Act so as to make them apply to the examination of a debtor in cessio proceedings. Formerly such a provision was unnecessary, at least in most cases, as the Sheriff by simply refusing cessio when questions were not satisfactorily answered, could have sufficiently punished an obstinate debtor. The fear of imprisonment as a penalty for debt having now been

removed, it became necessary to place the debtor under a *cessio* in the same position as a bankrupt, and render him liable to imprisonment for contempt of court when he refuses to be sworn or to answer questions, to sign his examination or produce his books. Under section 10 of the Act of 1881 there have been also incorporated sections 88, 90, and 91 of the Bankruptcy Act, so that it is now competent upon the application of the trustee to order an examination of the debtor's "wife and family, clerks, servants, factors, and law-agents, and others who can give information relative to his estate," to compel them to answer all lawful questions, and adjourn the diets of examination as may be necessary. There are therefore now the same facilities afforded for getting at the truth in a *cessio* as in a bankruptcy proceeding.

It may be asked, What if the debtor who is asked to execute a disposition *omnium bonorum* maintains that he is not a notour bankrupt, or that the petitioner is not really a creditor of his, and therefore not entitled to make the demand, how is this question to be determined? Under section 8 the petitioning creditor is bound to produce along with his petition "evidence that the debtor is notour bankrupt;" and by section 9 the Sheriff, if he is satisfied that there is *prima facie* evidence of notour bankruptcy, shall issue the warrant for the debtor's examination, etc. It would appear to us, that when such evidence is tendered by the creditor petitioning, the Sheriff has no alternative but to publish his warrant. In a recent case, however, Sheriff Guthrie Smith, notwithstanding the existence of such *prima facie* evidence, has recalled the interlocutor of the Sheriff-Substitute ordaining the debtor to appear, and allowed defences tendered by the debtor, in which the *bona fide* nature of the alleged debt is disputed, to be received, and a record made up. It would rather seem that without such a record a full inquiry into the facts of the case would be possible under sub-section 3 of section 9, in terms of which a proof to the parties may be allowed if necessary after the examination of the debtor. A creditor, it must be borne in mind, may be punished with imprisonment for making a false claim or statement (Act of 1880, sec. 14). The *cessio* has always been the remedy for debtors with little or no estate. The Sheriff has the power (Act of 1881, sec. 11) to dismiss the process if he thinks it expedient, "having regard to the value of the debtor's estate, and the whole circumstances of the case," that bankruptcy proceedings should be adopted; and he may follow this up by awarding sequestration. When a decree has been pronounced ordaining any debtor to execute a disposition *omnium bonorum* to avoid inconvenience to the creditors from his failing to do so, the decree is declared to operate as an assignation in favour of the trustee named in it (Act of 1880, sec. 9). The expense of obtaining a decree and disposition is paid "out of the readiest of the funds thereby conveyed" (Act of 1880, sec. 9). But no court fees nor Government duties are

exigible (Act of 1880, sec. 11). Power is given to the Sheriff to put into safe custody money or other valuables belonging to the debtor pending sequestration or cessio proceedings (Act of 1880, sec. 12).

Up to the year 1881 no provision had been made for the discharge of the debtor under a cessio. The Act of that year (44 and 45 Vict. c. 22), which was passed to "amend the Bankruptcy Acts and Cessio Acts with respect to the discharge of bankrupt debtors in Scotland," by its 5th section empowered the debtor to apply for his discharge on the expiration of six months from the date of the decree. The provisions of the Bankruptcy Act (sec. 46) with regard to the conditions necessary for a successful application were made to apply to cessios. But a new condition was attached (secs. 6 and 7, Act of 1881), and no debtor can now be discharged unless he has paid a dividend of 5s. in the £, or given a satisfactory reason for his failure to do so.

We note in the next place the provisions relating to imprisonment for debt. In the abolition of the time immemorial punishment for debt, the Legislature, it will be remembered, advanced by stages. The first change in the law was effected by the Act of 1880 (43 and 44 Vict. c. 34). A distinction was then made between different classes of debts. For an ordinary debt no one was henceforward to be imprisoned. But he might be if he failed to pay a tax, fine, or penalty due to the Queen, or his rates and assessments. "Sums decerned for aliment" were also excepted. But no one could be imprisoned for a longer period than twelve months in any excepted case. These provisions continued in operation for only one year and ten months, and they do not seem to have given rise to much litigation. One question, however, which would have been of much importance had the law remained unaltered, was raised in *Walker v. Bryde*, Dec. 6, 1881, 9 R. 249. The decision is of little practical interest now, but is worthy of notice as an interpretation of the words of a statute. It possibly led to the further change in the law which took place shortly afterwards. Looking to the terms of the statute, imprisonment for more than twelve months at first sight appeared incompetent. This, at all events, was the opinion of Mr. William Walker, the father of an illegitimate child, who had lingered one year in jail as the penalty for failing to pay the aliment due for that period. But at its expiry he was served with a second warrant. A new year brought with it liability for further aliment, and, it was contended, to a second period of imprisonment.

The Lord Ordinary held that one year's imprisonment was the utmost limit now competent in any of the excepted cases under the statute; that such imprisonment was awarded as a means of enforcing obedience to the decree which the debtor is charged to implement or perform, and that although there may be successive defaults in payment by the debtor, there could only be one

performance, "namely, by complete implement of the whole obligations constituted by the decree." But in the Inner House a different opinion prevailed. The suspender's argument, it was admitted, appeared a sound one "on the mere words of the statute;" but if effect were to be given to it, it was thought that the section about imprisonment for aliment "would become nugatory altogether." "It cannot be contended," said the Lord President, "that because a man was imprisoned for not paying his taxes one year, he cannot be imprisoned for not paying his taxes due for another year, and aliment, like a tax, is a constantly recurring obligation." It was admitted that this construction might lead to perpetual imprisonment; but then there was, as there had always been, the remedy of cessio. In the excepted cases, therefore, the Act of 1880 had not even the effect of necessarily limiting the period of imprisonment. A case was conceivable in which the obligation was constantly recurring. In such a case the creditor had merely the trouble of serving a new warrant each year.

Under the 4th section of this statute it was provided that nothing contained in it "shall affect or prevent the apprehension or imprisonment of any person under a warrant granted against him as being *in meditatione fugæ*, or under any decree or obligation *ad factum præstandum*." These two exceptions have each been the subject of judicial consideration. In *Kidd v. Hyde*, May 19, 1882, 9 Ret. 803, where a *meditatio fugæ* warrant was sought by a creditor who held an extracted decree against his debtor, Lord Rutherford Clark in giving judgment said: "Now that diligence against the person is abolished by the Act of 1880, it may be urged that all apprehension on *meditatio fugæ* warrants falls with it." Then, after noticing the above proviso, he goes on to say: "But after decree has been obtained I fail to see of what use the warrant can be. Nothing can be done against the person of the debtor except to give him a charge, if that can be considered to be diligence against his person." Nor was such a warrant necessary in order that a cessio might be brought by the creditor, because that could only proceed in the county where the debtor has his domicile; and if such a domicile existed, apprehension of the person was unnecessary. It is obvious that Lord Rutherford Clark was rather at a loss to discover for what purpose the *meditatio fugæ* process has been retained. He indeed suggests that a creditor might avail himself of it in order to give a charge. But he adds, after making this suggestion: "It is questionable whether the Legislature had under their notice the true nature and office of *meditatio fugæ* warrants." The Court was unanimously of opinion in the above case, that as such a warrant would be of no use, it was incompetent to issue it. The remaining exception decrees *ad factum præstandum* was before the Court in the case of the *Balerno Paper Mill Company v. Mackenzie*,

decided upon 11th July last by seven judges. The facts of the case are simple. A defender was ordained to consign a sum of money in the hands of the Clerk of Court. He refused to do so, and was on 28th December 1882 imprisoned in the prison of Glasgow. After hearing parties, he was liberated by the Lord Ordinary. The case then came before the Inner House, when the reclaimers contended that the present decree was clearly *ad factum præstandum*, and that consequently the recent statute did not apply. It was an order to do something—to consign, not to pay. On the other hand, it was maintained that this was virtually a decree for payment. The judges, with the exception of Lords Shand and Craighill, took the view urged for the reclaimers, and held that imprisonment was perfectly competent. The result of this action may have seemed to many anomalous, and possibly the keen opponents of imprisonment will seek to found further legislation upon it. It may be urged how inconsistent it is to imprison one who may ultimately be proved to owe nothing, while you cannot touch the man against whom a final judgment has gone forth. But it will surely be admitted that a court of justice must have the power of enforcing its own orders, made during the progress of a lawsuit before it, and necessary in the opinion of its judges for the proper conduct of the case. The following up of the judgment, ultimately given, by imprisonment until payment of the sum decerned for, is quite another matter. When the Court has decided the merits of the case, its function is really at an end. The Act of 1880 had abolished imprisonment for civil debts. The majority of the judges held that this man was not imprisoned for any such debt. “Although,” said the Lord Justice-Clerk, “the question between the parties is not concluded, even if it were so I am of opinion that the obligation to consign involved no liability for a civil debt, but, on the contrary, implied that it still remained doubtful whether the money ordered to be consigned represented any debt. The words, ‘on account of a civil debt,’ mean, because of his failure to pay a civil debt. Now the complainer has not only not failed to pay a civil debt, but it has not been decided that he is owing any debt, and therefore he cannot have been imprisoned on account of a civil debt.” Further, the special exception in favour of decrees *ad factum præstandum* rendered the matter clear, and answered the objection that the subject-matter was in this case really a civil debt. The opposite opinion is well argued by Lord Shand: “I confess,” he says, “myself unable to see any sound distinction in the present question between a decree for payment in the ordinary sense and a decree for consignment, or any ground in reason for holding that imprisonment should be competent where the decree is in the one form, but not in the other. In either case money has to be paid. In the one case it must be paid to the creditor to whom it has been found due. In the other it must be paid into court, either because it has been

found due, but is the subject of a competition, or because in a *prima facie* view of accounts stated it appears that the amount is due, and it is reasonable in the view of the judge that it should be consigned." He points out that in one sense all decrees are "*ad facta præstanda*, or for performance of an act," but thinks that decrees specially so called are for the performance of acts other than the payment of money. Lord Rutherford Clark, while agreeing with the majority, remarked, "I would not like to say that there may not be decrees of consignation which are decrees of debt only, as for instance a decree of consignation against the nominal raiser in a multiplepounding, when the fund *in medio*, consisting of a sum of money, has been admitted or ascertained. The decree is for payment of a debt, and takes the form of a decree of consignation merely because of the competition which makes the creditor uncertain. I would suppose that under such a decree the debtor could not be imprisoned, and that the ordinary execution for the recovery of a debt would follow upon it." This guarded opinion suggests the most reasonable view of the whole matter. A man is not to be imprisoned for what is really a civil debt in consequence of the form which the decree may have taken. But, on the other hand, a decree *ad factum præstandum* is not to be necessarily deprived of its sanction because the act to be performed happens to be the payment of money.

The Act of 1880 was not satisfactory. It did not go far enough to satisfy the reformers, for imprisonment was still retained in certain classes of debts. The decision in the case of *Walker v. Bryce* established that the period of imprisonment, although *ex facie* of the statute limited to one year, might really be of long duration. The distinction between the various kinds of debt was in itself objectionable—the Crown was placed in a better position than ordinary creditors. Lastly, the imprisoned debtor had still to be maintained while in prison at the expense of his incarcerating creditor. This was an obstacle in the way of a numerous section of the privileged creditors availing themselves of their statutory powers. After a short experience of this Act, we have seen another passed, amending the law relating to civil imprisonment (45 and 46 Vict. c. 42), which came into operation in October 1882. If this latter statute does not entirely abolish imprisonment for debt, it certainly comes nearer doing so than its predecessor. It deals with two of the excepted classes of debts, viz. sums due for aliment, and rates and assessments. Apparently it leaves untouched the "taxes, fines, or penalties" due to Her Majesty. Imprisonment must surely be still held to be a useful remedy in the case of obstinate debtors, seeing that the Crown has not given up the privilege of using it. A Crown debtor may even yet be imprisoned for a year, and indeed, if we imagine a case in which each year brings fresh liabilities, for a much longer period. Where the debt is a rate or assessment as distinguished from a Crown tax,

the imprisonment has been restricted to a period of six weeks. Alimentary debts have been treated in quite an exceptional manner. The period of imprisonment is indeed the same, viz. six weeks; but while the ordinary legal machinery will still be put in force against the debtor who has failed to pay his assessment, a special application for imprisonment must be made to the Sheriff, and to the Sheriff alone, where the debt is of an alimentary nature, and the debtor has it in his power to lead evidence as to his inability to pay. Then there is the renewal of the warrant of imprisonment after an interval of six months, applicable to the same sum of aliment, and the clause which frees the creditor from all liability "to aliment or to contribute to the aliment of the debtor." The Supreme Court had these provisions under their consideration in the recent case of *Tevendale v. Duncan*, March 20, 1883, when Lord Young hardly concealed his opinion of the statute upon one point. He raised the question whether, if a Sheriff simply commits or refuses to commit, the Court of Session can do anything by way of review. "We have," he says, "no power to commit, and can exercise no discretion in the matter. We can only pronounce decree—we did so the other day in an action of separation and aliment, and I suppose the sums there were sums decerned for aliment. All legal executions may be done under that decree. Formerly we could have imprisoned; now there can be no power of imprisonment exercised by us, but being the decree of a competent court, any Sheriff can commit under that decree. That is certainly a singular provision; but it is the provision of the statute. . . . We may give decree for the aliment, we have no power to say whether the debtor should be imprisoned or not. A creditor cannot enforce our decree by imprisonment, unless he can persuade a Sheriff or Sheriff-Substitute to send the debtor to prison." His interpretation, in this same case, of the expression, "any sum or sums decerned for aliment," might lead, as pointed out by Lord Craighill, to a practical difficulty. Lord Young says: "I think the true meaning is, that the sums must be decerned for with a view to be applied when they are got in alimentering the party in whose favour the decree is given." But in the vast majority of alimentary cases—those of illegitimate children—the decrees for sums of aliment include arrears which just form repayments to the mothers of the money expended by them in the past. Can a man be imprisoned for such arrears? "Take the case," says Lord Craighill, "of a father's obligation to aliment an illegitimate child. Decree cannot be got before the child is born, and there is always an interval after the birth before action is raised. That liability runs from the birth, and yet the result will be this, that the sum of aliment decerned for will be divided into two parts; for the one he may and for the other he may not be imprisoned." But we do not think that this decision is sufficient to form an authority for holding that some such division is to be

made, and that imprisonment cannot competently follow upon a failure to pay arrears of aliment. It has been decided that inlying expenses are covered by the similar expression, "sums decerned for aliment," in the Personal Diligence Act (*M'Gungles*, July 19, 1860). But inlying expenses are not future aliment to be applied in alimentering the party seeking to recover them. Moreover, the Act of 1882 expressly includes expenses of process, pointing to this, that imprisonment may follow upon the wilful refusal to pay any part of the sums contained in the decree, while applications for imprisonment may be renewed from time to time, relating to the same alimentary sums, as long as they remain unpaid.

Lastly, we will only refer to the provisions framed for the punishment of fraudulent debtors and creditors. They will be found in sections 13, 14, 15, and 16 of 43 and 44 Vict. c. 34. The object of that statute was certainly a good one, but whether these clauses will have much practical effect remains as yet to be seen.

REMARKS ON RECENT ENGLISH CASES.

Stoppage in transitu.—The case of *Kendal v. Marshall, Stevens, & Co.*, L. R. 11, Q. B. D. 356, illustrates the almost metaphysical distinctions that are drawn as to what is and what is not to be considered the end of the transit. A case like that of *M'Leod v. Harrison*, Dec. 7, 1880, 8 R. 227, one of the latest Scottish cases on the subject, is comparatively easy. In that case it was held the vendor had a right to stop the goods in the hands of a railway company at Riga, who had received them to send on to Moscow, the transit being, as was remarked by Lord Young, very well expressed in the bill of lading, "to be delivered in good order at the port of Riga unto the agent of the R. D. Railway, to be forwarded by them in transit to A. & Sons, Moscow." By the very terms of the bill of lading the goods were "in transit" when they were at Riga. In the case under notice, goods were sent in accordance with the vendee's instructions to a firm at Garston who were forwarding agents. Nothing was said to the vendor as to any further destination. The vendee had arranged with the forwarding agents to have the goods sent by one of their ordinary steamers to Rouen. The goods were stopped in the hands of the railway company at Garston, the company having given notice to the agent of their arrival, and that they would hold them as warehousemen. It was admitted that the possession of the railway company was the possession of the agent, and there was no question on that point. The Court of Appeal held, reversing the decision of Matthew, J., that the transit was at an end when the goods were in the possession of the forwarding agent. The general rule on the subject is stated by Lord Hatherley, then Vice-Chancellor Page Wood, in *Berndtstein v. Strang*, L. R. 4 Eq. 481. The point to be looked at is, "whether there is any intermediate person interposed

between the vendor and the purchaser." And as to the case in question there, which was that of goods delivered to the master of a ship chartered by the vendee, but the vendor had taken bills of lading in his own name, it is said: "The whole case here appears to me to turn upon whether or not it is the man's own ship that receives the goods, or whether he has contracted with some one else *qua* carrier to deliver the goods." In *Ex parte Rosevear China Clay Co.*, L. R. 11 Ch. D. 560, the goods were to be, and were, delivered at Fowey on board a vessel chartered by the vendee for the purpose of being carried to Glasgow, the ultimate destination not being known to the vendors. It was held the transit was not at an end when the goods came into the possession of the master of the ship. "The authorities show," said James, L.J., "that the vendor had a right to stop *in transitu* until the goods have actually got home into the hands of the purchaser, or of some one who receives them in the character of his servant or agent, not in the hands of a mere intermediary. . . . The mere fact that the port of destination was left uncertain or was changed after the contract of sale can make no difference. The principle is this—that where the vendor knows that he is delivering the goods to some one as carrier who is receiving them in that character, he delivers them with the implied right . . . of stopping them so long as they continue in the possession of the carrier as carrier." It might seem that a forwarding agent, who receives the goods merely as forwarding agent, and in consequence of instructions to forward them by the next of his line of steamers in the usual course of traffic to a destination named by the vendee, is also an intermediary as well as the master of a ship chartered by the vendee, who receives in order to take to a destination of which the vendor knows nothing. But the Court of Appeal held that the cases were different, and the present case fell not within the rule of *Rosevear China Clay Co.*, but within the rule of *Dixon v. Baldwin*, 5 East 175, also a case about a forwarding agent. In that case the goods were ordered to be sent to a firm at Hull "to be shipped for Hamburgh as usual." The firm at Hull was described as, in their course of dealing, a mere instrument between buyer and seller, and they had no other authority than to forward the goods. At the time of the stoppage they were waiting for orders from the vendee. Lord Ellenborough held that the goods had got so far to the end of their journey that they waited for new orders from the purchaser to put them again in motion, to communicate to them another substantive destination; and that without such orders they would continue stationary. In the present case of *Kendal* the learned Lords Justices endeavour to distinguish it from the *Rosevear China Clay Co.*'s case in various ways. The vendee, it is said by Brett, L.J., did not direct the vendors to deliver the goods to the forwarding agent in order that they might be sent to Rouen, in which case the transit would have been to Rouen. But no more did the vendee in the other case direct the

vendor to deliver to the master of the ship that the goods might be sent to Glasgow. Then his Lordship says: "The point which makes the difference between this case and the cases relied upon by the vendors is, that the forwarding agents received their instructions from the vendee and not from the vendor." But in the other case the master of the ship also received his orders from the vendee, not from the vendor. The vendor did not even know what the destination of the goods was. Lord Justice Cotton says, in the *Rosevear China Clay Co.'s* case: "The putting the goods on board the vessel was an indication that the goods were to go on a voyage which was not only not unfinished, but was not even begun." But in *Kendal's* case, the putting of the goods in the hands of a firm which was nothing but a forwarding agent was surely a similar indication. The real point attempted to be set up as a distinction is, that the goods were in the hands of an *agent* for the vendee. Lord Justice Cotton carefully makes this point, remarking that in the *Rosevear* case Brett, L.J., and he had guarded themselves against extending the principle of that case to a case like the present, the former having said: "If the goods had been delivered to the purchaser or his agent, and he or his agent had shipped them, I should have thought that after that there would have been no transit;" and the latter saying: "If the contract had been to deliver to an agent of the purchaser at Fowey, it would have been a very different matter." But there are agents and agents. In the present case the agents were agents to *forward*, and forward by their next ship, and agents for nothing else. As remarked by Matthew, J., "There was clear evidence that the buyer never intended that the firm at Garston should have charge of the goods for any other purpose than for the performance of their contract with him to send them from Bolton for delivery at Rouen." The decision amounts to this, that a forwarding agent whose whole business is forwarding, and who has received the goods solely for the purpose of being forwarded to a place mentioned, is not an intermediary. A distinction might perhaps be drawn between this case of *Kendal* and that of *Dixon v. Baldwin*, not to the advantage of the view taken by the Court of Appeal in the former. In *Dixon's* case Lord Ellenborough's ground of judgment was, that the agents "waited for new orders from the purchasers to put the goods again in motion . . . without such orders they would continue stationary." In the present case the forwarding agents waited for no new orders. Any authority they had in relation to the goods was from an order from the vendee to send them to Rouen as soon as possible by one of their regular steamers.

Married Women's Property Act.—*Effect of alteration of the law after the date of will*—*Bequest to "A. and B. and the wife of B."*—The case of *Manders v. Harris*, 52 L. J. (Ch.) 680, has received a large amount of attention on account of the illustration it is supposed to afford of the far-reaching effects of the English Married Women's

Property Act. Certainly the effects of that Act will be far-reaching enough if it is to have effects so remote as that which was given to it here.

By a will, dated in 1880, a legacy was granted to "my residual [*sic*] C. J. M. and J. H. and E. M. H. his wife for their own use absolutely." Was this a bequest of one-third to each of these three persons named, or was it a bequest divided into moieties, one moiety to C. J. M. and the other to J. H. and his wife? It was held that although the latter construction would have prevailed but for the passing of the Married Women's Property Act, that Act has so altered the law that since its passing the other construction must prevail. And it was also held, that as a testator is supposed to know the law and the alterations in the law, it was of no consequence that the will was made before the Act, no alteration being made in the will after the Act.

The former rule of construction and the reason of it are thus explained by Mr. Justice Chitty: "The reason of the rule of construction which prevailed, and which, subject to the operation of the Act, still prevails—namely, that where a gift is made to husband and wife and a third party, husband and wife only take one share between them—is thus stated by Littleton: 'The husband and wife are all one person in law.' That was not correct even in Littleton's time, because they were, according to the more accurate language of the Privy Council in the case of *Dias v. De Livera*, L. R. 5 App. 123, only one person in law for most purposes. That being so, on the question of construction it was held that being but one person they could take but one share. Whether that was or was not a refinement I am not in a position to consider, to some minds it would appear a refinement." But all this, it appears, is changed by the Married Women's Property Act. Under the Act a wife has many independent rights not previously possessed by her. For example, she may dispose of her property as if she were a *feme sole*, she may enter into contracts, may sue or be sued, carry on a trade separate from her husband, become bankrupt, may be proceeded against criminally by her husband, or may proceed against him. "Under this Act," continues the learned judge, "is it true to say that husband and wife are one person, or one person for most purposes with reference to property? It appears to me there has been so extensive an alteration made by the Act, that it would be wrong to apply any longer to a question of the construction of a will the principle on which the Courts formerly acted—namely, that for most or all purposes the husband and wife are to be regarded as one person. The alterations are such as to bind the Court to adopt that which, in the language of the Privy Council, is the more natural language of the two."

So far so good. The next point to be considered is whether, in considering the intention of the testator, the circumstance that the law was not altered till after the will was made, although in the testator's

lifetime, is of any importance. This was held to be of no importance, the reason being that a man is supposed to know the law, and consequently any alterations in the law. "The plaintiff's counsel felt that they could not contend that there would be any distinction in this case if the will had been made after the date fixed for the commencement of the Act. The result would be the same in either case, subject to this, that the will comes into operation after the date fixed for the commencement of the Act. They could not avoid making that admission after the judgment of the late Master of the Rolls in *Hasluck v. Pedley*," L. R. 19 Eq. 271.

The judgment in *Hasluck v. Pedley* being considered so conclusive, it is important to note what was decided in it. The case referred to the Apportionment Act, which provides that rents are to be considered as accruing from day to day, and are to be apportionable accordingly. This positive provision is what, it was held by the Master of the Rolls, the testator, whose will was made before the passing of the Act, but died after it came into operation, must be presumed to have known. "It is said that testators make their wills on the supposition that the state of the law will not be altered; and it is contended that this will ought to be construed as it would have been under the old law. The answer to that is, that a testator who knows of an alteration of the law (as this testator must be presumed to have done) and does not choose to alter his will, must be taken to mean that his will shall take effect according to the new law." A similar judgment had been given in a case as to the same Act by Malins, V.C., in *Capron v. Capron*, L. R. 17 Eq. 288: "Every testator is presumed to know the law. . . . I am much inclined to think that the case falls within the provision of the 24th section of the Wills Act, which prescribes 'that every will shall be construed to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will' On the other hand, it was observed by Lord Selborne in the case of *Jones v. Ogle*, L. R. 8 Ch. 192, also in reference to the Apportionment Act: "If it were necessary to decide, I should have very great difficulty indeed in seeing my way to the conclusion that this Act of Parliament either was intended to alter, or did alter, or has in this case had the effect of altering, the proper construction of words contained in a will made before the Act was passed. If a will had been made afterwards, I can quite follow the argument which would say that in such a case a testator makes his will having the Act of Parliament in view, and that the words he uses are not to be construed without regard to the Act of Parliament. But I apprehend the construction of the words of a specific gift will be taken generally according to the meaning of the words at the period the will was made."

It is certainly going far enough, to say that a testator who in making his will intends to make a final settlement, as at that time,

of all his worldly affairs, and expects to have that burden off his mind, should require to keep himself posted up in all the new Acts of Parliament, otherwise the settlement he has made may be altered unknown to him. But it is going a great deal farther to hold that the testator not only is presumed to know the provisions of new statutes, but the inference to be drawn from these provisions, such as in this case, that husband and wife are in the theory of the law no longer regarded as one person. Further, in this case it is held not only that a testator is presumed to know the inference, or what a judge thinks the inference, from a number of provisions in a statute, and a new statute too, which has never been the subject of explication, but that he is presumed to know the theory on which the former rule of construction was based. We do not think he is. A rule of construction survives long after the original reason for it has become forgotten. A bequest "to A., and B. and C. his wife" would give a half to A. and a half to B. and C., not because of any theory in the testator's mind on the subject of the relation between husband and wife, but because he was told these words were an apt form of expression for giving effect to such a purpose.

In the case of *Hasluck v. Pedley* there was a distinct provision in the Act, and it was this, that the testator, it was held, was presumed to know. If this Married Women's Property Act had provided that a bequest to A. and B. and C. his wife should be construed as meaning a third to each, then the case would be on all fours with that of *Hasluck*, in which the Master of the Rolls laid down the principle which Mr. Justice Chitty has applied, or rather misapplied. In *Hasluck's* case it is said: "The Act (the Apportionment Act) does not affect the meaning of the will; it only alters its legal operation. A devise of Blackacre before the Act carried the accruing rents: now it does not; not because the meaning of Blackacre has been altered, but because the legal effect of the devise is different." In the present case the Act, it has been held, *does* affect the meaning of the will.

Mr. Justice Chitty's view is, that the inference to be drawn from the new Act destroys the old theory about the husband and the wife being one person, and it was the presence in the testator's mind of the old theory that, on an inquiry as to the testator's intention, led to the construction being put upon the words which was put; consequently that construction is destroyed also. All this supposes a good many things, not all of which exist,—that the inference does follow from the Act; that the testator knew of and acted upon his knowledge of the Act and the inference also; and that he knew the reason of the old rule of construction, and had acted upon his knowledge of it in framing the bequest as he did.

Bills of lading—Tender of part of set of three.—In the important and well-known case of *Glyn, Mills, & Co. v. East and West India Dock Co.*, L. R. 7 App. Cas. 591, Glyn, the bankers, had advanced money on the first of a set of three bills of lading

sustained the defence. The Master of the Rolls observed that the expression, "author of a photograph," was a singular one. We speak of the author of a book, but we do not speak of the author of a painting. We know that by the author of a painting is meant the artist, but as to the author of a photograph, in the production of which many persons may be concerned in one way or another, we have to see who stands in the position most like to that of the artist in the case of a painting or drawing. It might be difficult to say who is the author, but the Court held it was certainly not the person who merely furnished the photographic materials and apparatus, and paid a man a wage for taking the photograph. "Author" implies something creative, and there is nothing creative in this. The Act in giving the copyright for the natural life of the author, clearly implies that by author is meant some living human being. A joint-stock company might supply materials, and employ assistants, but what would be the term of the natural life of a joint-stock company? The plaintiffs, it may be observed, had endeavoured to get over this difficulty by registering the partners of the company, and not the company itself, as author. It is obvious that if the company who employed assistants and supplied materials is not the author, as little could the persons be so whose only relation to the photograph was that they were partners of such a company. The Court did not require to determine who was the author. More than one person, it was said, might be employed in taking a photograph; one man to arrange the group, put in the plate, and adjust the lenses, and another man to prepare the plate; but it was thought the person who superintended the arrangements, who actually placed the people in position, who gave the orders, was the effective cause of the picture being produced, and therefore the author, if anybody was.

That a firm which keeps a photographic establishment, provides material and apparatus, and employs men to take photographs, the members of which firm may never have been near the place where the photograph was taken, who may, indeed, never have become aware that such a photograph existed until it was proposed to raise an action for infringement of the copyright, should be considered the "author" of the photograph, seems so absurd an idea, that one cannot help wondering anybody should have ever entertained it. Yet it appears that this was the idea which prevailed among photographers, and no doubt it had been generally acted upon by the London Stereoscopic Company, a leading photographic firm. It had become so firmly fixed in the heads of the partners of this firm, the plaintiffs, that it required two judgments, first of Mr. Justice Field, then of the Court of Appeal, to take it out again. If we applied a similar test of authorship to literature, then many a respectable publisher who had never written a line for publication in his life, but had employed literary

backs to do the biographical, or biological, or botanical articles for an encyclopædia, would find himself to his surprise a voluminous and a versatile author, and one whose views were sometimes orthodox, and sometimes very much the reverse. The idea on which the proprietors of photographic establishments acted, viz. that they were the authors, supplying the materials and apparatus, without which the artist could do nothing, and supplying accommodation for the "subjects," was a very convenient idea for them to act upon. That, so far as copyright is concerned, a photographic firm should ignore the existence of the man who takes the photograph is natural enough. He is regarded as one of their servants, and one having no interest in the copyright, not as a creative artist, and what he does is regarded as services rendered, not as the creation of a work of art. But it is as a creative artist that he is regarded by the Act. Somebody at least is so regarded, and who else can it be? A photographic firm looking at the copyright as a piece of property, naturally would prefer to have their property registered without any mention of the servant, who in reality has no interest in the copyright. The artist has no copyright, because the Act provides that, where the negative of a photograph is made or executed for a person for a good or a valuable consideration, the copyright belongs to that person. The truth is, that in treating of photographs the Act has treated photographs too much as artistic works, and forgotten that practically photography is an industrial art. A man is employed by his master to take photographs just as a watchmaker is employed to make watches. It is absurd to make the same provisions in such a case as in the case of the paintings of an artist, who, presumptively, and to start with, has the property in his own work. Why should the duration of the copyright depend upon the life of a paid servant who never had the copyright, whose connection with the photograph ceases when he has done his bit of work, who may pass out of the employment, and his employer may be unable to discover whether he is living or dead, and consequently whether the copyright subsists or not?

As is not unusual with judges when they have to deal with subjects of a literary or artistic character, some "fancy" views were expressed in this case. For example, the Master of the Rolls, in considering who is to be regarded as the author of a photograph, observed that, after all, it was the sun who drew the picture. This is not strictly correct in any view. Every dog has his day, and science has so far advanced that in taking photographs we can now do without the sun. But the observation has little bearing upon the question who is to be regarded as the author for the purposes of registration, and this was the matter in hand. To say that the sun is the author, is a "solar myth" of a new kind. The sun is not the author, it is only the physical agency which is employed. We should not say that electricity is the author of

a telegram. It is to be observed that the author's place of abode requires to be mentioned in the memorandum of copyright. What place of abode should we assign to the sun? Probably, the universe; but the registrar might consider this too vague a specification, and might desire to know the street and the number.

DISSECTION AND RESURRECTION.

A KNOWLEDGE of the causes and nature of sundry diseases which affect the human body, and of the best methods of treating and curing such diseases, and of healing and repairing divers wounds and injuries to which the human frame is liable, cannot be acquired without the aid of anatomical examination. So saith the preamble to the British Anatomy Act of 1832. The chief hindrances to the pursuit of the study of anatomy have arisen from ignorance and superstition. A prejudice has prevailed in all nations against the violation of the human body after death. Even now, only philosophers like Jeremy Bentham are willing to have their bodies dissected by their friends. Simple association of thoughts causes the remains of a dead kinsman or friend to be treated with respect and tenderness; in the same way the horror of death attaches to anything connected with the dead, and the religious idea that the soul outlives the body, and continues in a ghostly way to retain a connection with its old habitation of clay, has led to the respectful disposal of the corpse among most nations.

The Ptolemy princes Philadelphus and Euergetes, who enabled their physicians to dissect the human body, and prevented the prejudices of ignorance and superstition from compromising the welfare of the human race, were far in advance of their times. Long after their day the Koran denounced as unclean the person who touched a corpse, and the rules of Islamism still forbid dissection; the old Moslem doctors only found opportunities of studying the bones of the human bodies in the cemeteries. Not until the days of Henry VIII. did the law make any provision for the cultivation and practice of the art of dissection. In 1540, more perhaps to strike terror into malefactors than from any enlightened notion of forwarding knowledge, the Legislature gave permission to the masters of the Mystery of Barbers and Surgeons of London to take annually four persons put to death for felony, for anatomies, and to make incision of the same dead bodies, or otherwise to order the same after their dissections, at their pleasure, for their further insight and better knowledge, instruction, insight, learning, and experience in the science or faculty of surgery, 32 Hy. VIII.

Elizabeth in 1565 made a similar grant to the College of Physicians, that they, observing all decent respect for human flesh, "might dissect the four felons." By 25 Geo. II. c. 37 (1752), the bodies of all murderers executed in London and Westminster were

to be given to the surgeons to be dissected and anatomized. But the legal supply of human bodies for anatomical examination still continued insufficient fully to provide the means of knowledge, and in order to furnish the necessary subjects, divers great and grievous crimes and murders were committed, the money paid being the incentive ; so in 1832 the Anatomy Act (2 and 3 Will. IV. c. 75) was passed. This Act provides for the licensing of those practising anatomy, allows any examiner or other person having lawful possession of any dead person (and not being an undertaker, etc.) to hand over the body for dissection (respect, however, being had to the wishes of the deceased or his known relatives) ; inspectors of schools of anatomy were likewise established.

In Canada the bodies of convicts who die in a penitentiary, if unclaimed by the relatives, may be delivered to the professor of anatomy in any medical college, or to an inspector of anatomy, 32 and 33 Vict. c. 29, § 100.

That defender of the faith, Henry VIII., the illustrious Elizabeth of most famous memory, and the enlightened James, had several statutes passed in which the disinterring of the dead is mentioned, but they were chiefly enactments against witchcraft, conjuration, the use of dead men's bones, and all sorts of sorceries. The Parliament of James solemnly enacted, "That if any person should consult, covenant with, entertain, employ, feed or reward any evil and wicked spirit to or for any intent or purpose, or take up any dead man, woman, or child out of his, her, or their grave, or any other place where the dead body rested, or the skin, bone, or any other part of any dead person, to be employed, or used in any manner of witchcraft, sorcery, charm, or enchantment . . . every such offender, his aiders, abettors, and counsellors, should suffer death as felons, and should lose the privilege and benefit of clergy and sanctuary," 1 Jac. I. c. 12. This philosophical enactment graced the statute book until the ninth year of George II. While these statutes against sorcery were in force, and the judges still imbued with the superstitious spirit of the age, the presumption was very strong that bodies disinterred were removed for purposes of enchantment or witchcraft, and resurrection-men and students of anatomy, as their aiders and abettors, were in imminent jeopardy of suffering as felons ; but as the belief in sorcery grew weaker the prospect of these men grew brighter, and they were relieved from the great danger that they ran.

Under the laws of Constantine a woman could without blame repudiate her husband, if he was guilty of violating the tombs of the dead ; and we are told that the Ostrogoths allowed divorce for this same reason. And among the Franks, one who took the clothing from a buried corpse was banished from society, and none could relieve his wants until the relations of the deceased consented, 1 Russ. on Crimes, 465. As long ago as the tenth year of James I. at the assizes in Leicester, a man was tried for stealing winding-

sheets. Sir Edward Coke tells the matter thus: "One William Ham had in the night digged up the graves of divers several men and of one woman, and took the winding-sheets from the bodies, and buried the bodies again; and I advising hereupon, for the rareness of the case consulted with the judges at Sergeants' Inn on Fleet Street, when we all resolved, that the property of the sheets was in the executors, administrators, or other owner of them, for the dead body is not capable of any property, and the property of the sheets must be in somebody, and according to this resolution he was indicted of felony in the next assizes; but the jury found it but petit larceny, for which he was whipped, as he well deserved." These learned people thought that if a winding-sheet had been gratuitously furnished by a friend the property remained in the donor. For, quoth they, the winding-sheet must be the property of somebody; a dead body being but a lump of earth hath no capacity; also it is no gift to the person, but bestowed on the body for the reverence toward it to express the hope of the resurrection; also a man cannot relinquish the property he hath to his goods unless they be vested in another, 3 Inst. 110, 12 Co. 113 a. Subsequently lawyers have generally concurred in these opinions; the coffin, too, is the property of the personal representative of the deceased, 2 East P. C. 652.

A still more interesting question arises as to who owns the corpse. It has been generally held that there is no property in it. Blackstone remarks that although the heir has a property in the monuments or escutcheons of his ancestor, he has none in his body or ashes. A contract for the sale of a corpse, even to doctors, will not be enforced; it cannot be made an article of merchandise, Am. Law T., July 1871. The relatives have the right of interring the body, and when this right is once exercised they have no further interest in it than to protect it from injury, *Guthrie v. Weaver*, 1 Mo. App. 136, 4 Brady 502; *Wynkoop v. Wynkoop*, 6 Wright 293. In Indiana the Courts have diverged somewhat from the beaten track, and held that the surviving relatives are entitled to the corpse in the order of inheritance as property, and that they have a right to dispose of it as such, subject to whatever burial regulations are reasonable and proper for the public health and advantage, *Bogert v. Indianapolis*, 13 Ind. 138.

The English Anatomy Act, as has been seen, gives the executor or other person having the lawful possession of the body of any deceased person power to permit it to be anatomically examined. In England the earlier writers on criminal law say nothing of the taking of a body from the grave, except it is not theft. East, however, calls it a great misdemeanour, and there have been several convictions for this as an offence at common law. Doubtless the belief that it was an offence at common law was merely connected with the idea of the bodies being used for the dark purposes of the necromancer, and it would appear that as distinct authority upon

the abstract point has been found in ancient legal records, Wilcocks, c. 10. It is still an indictable offence, punishable with fine and imprisonment, or both, 2 East P. Cr. 652; *R. v. Gillies*, Russ. and Ry. 366 n; *R. v. Lynn*, 2 T. R. 733. And this even though the body has been taken in the interest of science, and for the purpose of dissection. In *Lynn's* case, who was indicted for entering a burying-ground, taking a coffin up, and carrying away a corpse for the purposes of dissection, it was urged that the offence was cognizable only by the ecclesiastical courts; but the judges of the King's Bench said that common decency required that a stop should be put to the practice; that it was an offence cognizable in a criminal court as being highly indecent and *contra bonos mores*, at the bare idea alone of which nature revolted; that the purpose of taking up the body for dissection did not make it less an indictable offence. They refused to stay proceedings, but inasmuch as Lynn might have committed the deed merely through ignorance, they only fined him five marks. Since then three others have been more severely dealt with.

It is also an indictable offence in many of the States to disinter a corpse, unless the deceased in his lifetime had directed such a thing, or his relatives consent to it; and that the resurrecting is for the purposes of dissecting does not improve matters, *Tate v. State*, 6 Black. (Ind.) 111; *Com. v. Loring*, 8 Pick. (Mass.) 370; *Com. v. Marshall*, 11 *id.* 350; *Com. v. Cooley*, 10 *id.* 37. In New York, removing dead bodies "for the purpose of selling the same," or "from mere wantonness," is punishable by both fine and imprisonment, 2 R. S. 688, § 13. And in New Hampshire and Vermont such offences bring upon those convicted, fines, whipping, and imprisonment, as the Court may see fit.

A person may be found guilty of this offence, even though he was not actually present at the body-lifting, if with the intention of giving aid and assistance he was near enough to afford it, if required, *Tate v. State*, 6 Black. 111.

Besides the danger he runs of being brought before a criminal tribunal, the body-lifter incurs the risk of civil proceedings being taken against him. It is true, as Blackstone says, the heir has no property in the body or ashes of his ancestors; nor can he bring any civil action against such as indecently, at least, if not impiously, violate and disturb their remains when dead and buried; but that learned commentator goes on to remark: "The person, indeed, who has the freehold of the soil, may bring an action of trespass against such as dig and disturb it," 2 Com. 429. This has been clearly established in a case in Massachusetts, where a father sued for the removal of the remains of his child, and recovered a verdict for 837 dollars in an action of trespass *quare clausum fregit*. Mr. Justice Forster, in giving judgment, remarks that a dead body is not the subject of property, and after burial it becomes part of the ground to which it has been committed, earth to

earth, dust to dust, ashes to ashes. The only action that can be brought is trespass *quare clausam*. Any one, said the judge, in actual possession of the land may maintain this against a wrong-doer. The gist of the action is the breaking and entering, but the circumstances which accompany and give character to the trespass may always be shown either in aggravation or mitigation. Acts of gross carelessness as well as those of wilful mischief often inflict a serious wound to the feelings when the injury done to property is comparatively trifling, and we know of no rule of law which requires the mental suffering of the party complaining, caused by the misconduct of the wrong-doer, to be disregarded, *Meagher v. Driscoll*, 99 Mass. 281 ; *Barstable v. Thatcher*, 3 Metc. 243 ; *Bracegirdle v. Orford*, 2 M. & S. 77 ; *Brewer v. Dew*, 11 M. & W. 625.

Willcocks, in his *Laws relating to the Medical Profession*, in his tenth chapter, when considering the lawfulness or unlawfulness of taking bodies for the purposes of dissection, says : " The whole question must depend upon the proper answer to these inquiries. Is it a violation of property ? Is it a personal injury to any individual ? Or is it an injury to the public ? Every lawyer who has mentioned the subject has admitted that there is no violation of property in respect of the corpse itself, which is necessary to constitute the removal an offence ; and Blackstone has distinctly stated that the only property violated is the grass and soil of the land wherein the body was interred, in respect of which the person may bring his action of trespass, but the law has not provided any punishment as for an offence. It is equally clear that it is not an injury to any person ; for the shrewd lawyers of Coke's time determined that the body was no person, but a lump of clay ; and the only injury which can give a right of action to that, which amounts to a violation of any legal right of a relative or master, is such as may be said to recoil upon him, by causing him expense, labour, or loss of valuable service. The unpleasantness which may arise from an attack upon prejudices, however intimately blended with good feeling and delicacy of sentiment, is ranked by the Court with that class of wrongs which are technically designated *damna absque injuria*."

In *Lynn's* case the judges assumed to answer the third question, that is, to assert that it is an injury to the public. Society is not injured by the disinterment of the dead for the purposes of science, for it could hardly exist without such a sacrifice of fastidiousness ; society is not insulted by the secret abstraction of the corpse from the vermin which crowd to pollute it, and they who so curiously seek the remains of those they hold dear behind the veil of science would do well to pry for one moment into the secrets of the sepulchre. They alone are the violators of every sentiment of delicacy and benevolence who insult the disconsolate relatives with the tale of the robbery and the pursuit, and with the foul spectacle of dismemberment they may have at length discovered.

It would appear that in a proper case, the Court, in the interests of justice, will compel the exhuming and examination of a dead body which is under the control of a plaintiff, if there is strong reason to believe that without such examination a fraud is likely to be accomplished, and the defendant has exhausted every other method known to the law of exposing it. However, such an order would be made only upon a strong showing to that effect. It would be a proceeding repugnant to the best feelings of our nature, and likely to be in many cases so abhorrent to the sensibilities of the surviving relatives, that they would prefer an abandonment of the suit to a compliance with the order. Thus spake the Court in a case where the order for exhuming was asked for and refused as not being justified under the circumstances. The action was on a policy of insurance, and the defence was that the insured had falsely warranted that he had never received any serious personal injury, whereas his skull had been fractured in boyhood, and had been healed by trephining; to prove this the company proposed to disinter his body after the suit had been pending eighteen months, upon the sole testimony of his physician that the deceased had said that he had been told of such an accident and operation. The counsel for the plaintiff called the proposal "revolting," and said that to break the signet of the grave, and take from its resting-place the sacred property of relatives to gratify the corporation's mercenary curiosity, would be worse than Shylock's demand, *Grangers' Ins. Co. v. Brown*, 57 Miss. 308.—*Albany Law Journal*.

The Month.

A Practical Punishment.—The most singular sentence that ever came to our knowledge was lately imposed by Judge Krekel, of the United States District Court in Missouri. The *St. Louis Republican* gives the particulars. William Hannah was arraigned in that court on the charge of selling liquor to Indians. He pleaded guilty, and gave as an excuse his ignorance of the law, and stated he could neither read nor write. He was a young fellow, and the judge not desiring to be too severe on an ignorant man, whose first offence was perhaps an accidental violation of a United States law, gave him some good advice, and proposed to him that he should learn to write, and in order to ensure success, sentenced him to the Cole County Jail until he should be able to write a letter. Hannah expressed a doubt as to his being able to learn the art of writing, but the judge assured him it could be done, if he applied himself, within a reasonable time, and in order to help him he would assign him a teacher. This teacher was one Martin, who having been

convicted of cutting timber off Government lands, was awaiting sentence. The judge calling up Martin sentenced him to the Cole County Jail for a term to expire when he should have taught the man Hannah to write. Martin willingly consented, and the two men went to jail. The success of this experiment in compulsory education was evidenced by the appearance before the clerk of the court of Hannah, who presented a specimen of very fair penmanship as a result of a little over three weeks' application. As a further test, the clerk requested him to write a letter. This test was rather too much for Hannah, who lacked readiness in composition, and was at a loss, he explained, for ideas. The clerk then dictated a letter to him, which he wrote very well, and having complied with the order of the Court by learning to write, was discharged. Martin was also discharged, having completed his part of the undertaking in teaching his fellow-prisoner to write. We commend this instance to Mr. Gaskell, the "Compendium" advertiser in *The Century* magazine.

Correspondence.

THE EDINBURGH UNIVERSITY LAW DEGREE

(*To the Editor of the Journal of Jurisprudence.*)

SIR,—The *Journal of Jurisprudence* has always been on the side of law reform.

It seems to me that in the various discussions on this interesting and fruitful subject which have from time to time appeared in your columns, the local character of the Edinburgh University Law Faculty has not been sufficiently recognised. With your permission, I should like to lay before your readers a special grievance which is being keenly felt by a small body of students. I shall endeavour to reward your kind indulgence by stating my case as clearly and as briefly as possible.

The Faculty of Law in Edinburgh University contains three classes of students—those who attend Scots Law and Conveyancing only, in order to qualify as law-agents; those who go through the entire legal curriculum and take the LL.B. degree; and a few ambitious men who regard their legal studies merely as the stepping-stone to political, diplomatic, and literary distinction. Of this last class, which includes members of the Inns of Court and probationers for the Civil Service of India, the Edinburgh University takes no cognizance. They may, indeed, sit under the same professors, and compete for the same class honours as their more favoured brethren, but compulsory attendance on Scots Law and Conveyancing cuts them off from the LL.B. degree, and the LL.B.

degree is the key to the highest legal prizes in the University, viz. the Forensic Prize, the Vans Dunlop Scholarship, and the Law Endowments Association's Fellowship.

This short-sighted policy affects very seriously not only the prospects of the students in question, but also the interests of the University itself.

1. It destroys the cosmopolitan character of the Faculty of Law. This seems to be felt by the authorities themselves. Professor Muirhead, in his Syllabus, says that his lectures will be equally adapted for those intending to join the legal profession in Scotland or in England, and for students qualifying for service in India or the colonies.

Again, the Senatus annually appends to its Calendar the regulations for admission to the India Civil Service, prefaced by a desperate invitation to successful candidates to spend their probation under its care. These considerations seem to me to dispose of the argument that the Faculty of Law in Edinburgh University is essentially a Faculty of *Scots Law*.

2. The attendance on the classes of Constitutional, Public, and Civil Law is very small. This is only the natural result of the narrow view which the University has hitherto taken of legal education. Men can hardly be expected to take such a devoted interest in jurisprudence as to pursue its study without the hope of a tangible reward. Mere class honours, no matter how substantial, never will make up for the absence of a degree, which alone stamps the work of a specialist as genuine.

3. The LL.B. degree is unpopular. From the analysis which I have previously given of the Faculty of Law, it must be apparent that the majority of students in the University are unable or unwilling to take it, and that this degree, which deservedly ranks so high in the estimation of all who know anything about it, is practically confined to a very small class.

The following remedies might be suggested:—

The Senatus might appoint its own examiners in English and Indian law, or accept the certificate of the Council of Legal Education, as the Council accepts our certificate in Civil, Public, and Constitutional Law.

A B.C.L. degree might be instituted, not such a degree as one of your correspondents recommended, whose exhaustive and complicated requirements would, I fear, have ensured its failure, but a degree with a scheme of examination flexible enough to include, at the option of the candidate, general jurisprudence and the various branches of English, Hindu, and Mahomedan law.

The merits or demerits of our case must not, however, be judged by the deficiencies in the remedies which I have proposed.

The University would not break in upon any monopoly by encouraging members of the Inns of Court to enrol in the Faculty of Law. The Inns of Court are essentially an examining and fee-

receiving body, and do not care where the information which they test is acquired. No conditions of residence or study restrict their scholarships, and the lectures delivered in the various halls are infrequent and necessarily incomplete. An extension of the law degree would be beneficial in several respects. It would give a hard-working class of students the legitimate reward of their labours ; it would increase the attendance on the scientific classes and the number of those who take the degree ; it would put some meaning into "the Edinburgh University being one of the colleges where successful candidates for the India Civil Service may spend their period of probation ;" and finally, it would arrest the gradual departure from the University of the Scottish students whose aims are *not* confined to Scotland.—I am, etc.,

A. WOOD RENTON.

GRAY'S INN, LONDON.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF PERTHSHIRE.

Sheriffs MACDONALD and BARCLAY.

BANK OF SCOTLAND v. JOHN M'CULLOCH.

On the morning of the 14th November last a person named William Macfarlane brought a horse to the premises of the defender, who is a butcher in Crieff. M'Culloch bought the horse from Macfarlane at £15. less 5s. of a "luck penny ;" but as he entertained doubts as to whether Macfarlane had honestly acquired possession of the horse, he gave Macfarlane a cheque for £14, 15s. on the North of Scotland Bank, Crieff, post-dated to 20th November. At ten o'clock that morning, when the bank opened, M'Culloch stopped payment of the cheque ; but by that time Macfarlane had gone to Perth and cashed the cheque at the office of the Bank of Scotland there. Before presenting it at the Bank of Scotland Office in Perth, Macfarlane seems to have erased the cipher of the date, thus making it appear as if it had been issued on the 2nd Nov. When the cheque, in the usual course of business, was presented at the North of Scotland Bank Office in Crieff, payment was refused, and the Bank of Scotland thereupon raised the present action against M'Culloch for payment of the amount in the cheque. The chief defence was the fact of the alteration of the date, and section 64 of the Bills of Exchange Act, 1882, which enacts that such an alteration rendered the cheque null and void, was founded on. The same clause, however, provides that where such an alteration "is not apparent," the holder of the cheque may enforce payment according to its original tenor. Witnesses were examined to prove that the alteration was not such as would likely be noticed in the ordinary course of business, and Sheriff Barclay, Perth, adopting this view of the matter, has decerned against M'Culloch for payment of the contents of the cheque, with costs. His Lordship's interlocutor and note are as follow :—

*“ Perth, 19th June 1883.—*Having heard parties’ procurators, and made avizandum with the process, proofs, and debate: Finds as matter of fact—*First,* The defender, on 14th November last, having purchased from William Macfarlane a horse at the price of £14, 15s. (but 5s. being abated), he on that date granted him a cheque or draft on the branch of the North of Scotland Bank at Crieff for £14, 15s. *Second,* The defender, entertaining doubts whether Macfarlane had honourably acquired possession of the said horse, he post-dated the cheque to the 20th of November to allow him an opportunity of inquiry. But on the same day, without time for such inquiry, he stopped payment of the said cheque at the branch bank at Crieff. *Third,* On the said 14th November, Macfarlane presented the said cheque to the pursuers’ branch at Perth, and the same was cashed to Macfarlane, and on being sent for payment to the branch bank at Crieff, the same was refused, because of the defender’s order to refuse payment. *Fourth,* That the said cheque, when presented to and cashed by the branch of pursuers’ bank at Perth, had the figure ‘0’ on its date scratched out, and therefore made the date of issue appear as the 2nd of November. *Fifth,* The said alteration, though declared by statute to be material, was not, in terms of the statute, apparent at the time of negotiation; therefore, the cheque being in the hands of the pursuers as holders in due course of business, they are entitled to enforce payment as if ‘it had not been altered,’ and accordingly repels the defences, and decerns in terms of the prayer of the petition, reserving the defender’s recourse against Macfarlane or others liable in relief: Finds the defender liable to the pursuers in the expenses of process, allows an account thereof to be given in, and remits the same, when lodged, to the Auditor of Court to tax and report. HUGH BARCLAY.

*“ Note.—*It is clearly proved that the date was changed from the 20th to the 2nd by the erasure of the cipher. But even yet it would require the attention of any person to be directed to the date to discover the alteration. Had the defender made the figures of the date (20) somewhat closer to the word ‘November,’ the cancellation would have been more apparent; but the ‘2’ now stands midway in the space, and this is very misleading. The dates of bills are of little materiality except in cases of the currency and payment depending on the date. Cheques and drafts are bills at sight or on order. Generally they are negotiated the same day when drawn, and rarely require to be post- or ante-dated. This case is evidence of the danger of such practice. Alterations on sums are much more easily detected, as they generally require the use of a pen rather than a penknife, such as the letters ‘ty’ being added to six, seven, eight, or nine, and therefore such alterations must always appear more apparent, and therefore more easily detected. ‘Apparent’ is defined by Dr. Samuel Johnson to mean ‘plain,’ ‘not doubtful,’ ‘open,’ ‘evident,’ ‘not merely suspected.’ Applying these definitions to the cheque in question, the alteration on the date cannot be said to fall under any one of their number. Of course the term must be understood as applying to the general community, and perhaps it may be expected that bankers should be more careful, and rank as experts with Argus eyes in minutely scanning such documents. There must be due, not exorbitant, care taken by every person in such cases. It would be culpable to take an important document in the dark or in undue haste. It is of little consequence, as

in this proof, that parties whose attention was previously called to the alteration might say that they would at once have discovered it. It is not usual to negotiate bank cheques unless where the name of the payee is expressly named in their body, or that 'the bearer,' being other than the drawer, indorses his signature on the back. There is no question as to the regularity of the transaction with the branch bank at Perth. The defender had drafts previously cashed by the Perth branch of the bank. No blame can be attachable to the officials there in repeating the accommodation. It was pled that Macfarlane, who obtained the cash, should be first discussed; but the defender, who was the granter of the draft, and on whose credit it was regularly cashed, was the principal debtor. It would have been well had he first made inquiry as to Macfarlane's right to sell the horse before granting the post-dated draft, which has led to all the mischief, and on the same day without time for inquiry, notwithstanding the sagacious advice of his wife, stopped payment of the cheque. H. B."

On an appeal the Sheriff (J. H. A. Macdonald) reversed the above interlocutor by the following judgment and note:—

"*Edinburgh, 28th August 1883.*—Having heard parties' procurators on the foregoing appeal, recalls the interlocutor of the Sheriff-Substitute appealed against, assoilzies the defender from the conclusions of the action: Finds the pursuers liable to the defender in the expenses of process, allows an account thereof to be given in, and remits the same, when lodged, to the Auditor of Court to tax and to report, and decerns.

"J. H. A. MACDONALD.

"*Note.*—The Sheriff is of opinion that the erasure in this case is apparent to ordinary observation. Bankers are presumed to have some reasonable quickness in noticing such vitiations, and no one looking at this cheque, even without a banker's experience, could fail to observe the erasure if he exercised that ordinary care which prudence dictates.

"J. H. A. M."

Act. Malcolm Stewart—*Alt.* Pinkerton.

SHERIFF COURT OF ROSS-SHIRE (DINGWALL).

Sheriffs MACKINTOSH and HILL.

SHIVAS' TRUSTEE *v.* SHIVAS' TRUSTEES.

Trust deed — Recall of arrestments by a creditor in trustees' hands.—
"The Sheriff-Substitute, having heard parties' procurators on the closed record, sustains the defender's second plea in law, and refuses the crave of the petition: Finds the pursuer liable in expenses, of which allows an account to be given in, and remits the same, when lodged, to the Auditor of Court to tax and report. CRAWFURD HILL

"*Note.*—The pursuer is trustee on the trust estate of Andrew Shivas, farmer, conform to trust deed in his favour dated 1st March 1882. The original defender is a son of the truster. He appears to have acquiesced in the appointment of the trustee, and he lodged a claim on

the trust estate, but his claim was rejected *in toto*, and he thereupon raised an action against his father for the sum he claimed, and thereafter used arrestments on the dependence in the hands of the pursuer as trustee. That arrestment the pursuer now asks to have recalled. It is said that, being an acceding creditor, the son could not competently use diligence calculated to give him a preference over the other creditors. But he is not really an acceding creditor. It may be quite true that he acquiesced in the trust at first, believing that his claim could be ranked on the trust estate. But it was rejected, and it would be rather hard to hold him as an acceding creditor to a trust on which he is not allowed to have any claim. The Sheriff-Substitute thinks the arrestment was quite competent. Whether it will attach anything is another question. The trust deed is binding on all the truster's creditors, whether acceding or not acceding, and by it he was divested of everything in favour of the trustee who holds his means and estate for behoof of the creditors. In the meantime he is due nothing to the truster, so that there is nothing to arrest; but there may be in the event of the trust deed being cut down, or of there being a reversion after the purposes of the trust are exhausted. The arrestment would then come into operation. But at present it has no effect whatever, and the trustee is at liberty to deal with the trust estate just as freely as if no arrestment existed. In these circumstances there seems to be no reasons for recalling the arrestment. *Nicolson v. Johnston*, 6th December 1872, 11 Macph. 179; *Henderson v. MacLintock*, 22nd November 1882, 10 Rettie 185. C. H."

Against this judgment the petitioner appealed, and the preceding interlocutor was recalled.

"10th August 1883. — The Sheriff, having considered the pursuer's appeal and heard parties' procurators, recalls the interlocutor appealed from, and recalls the arrestment mentioned in the prayer of the petition in terms of said prayer, and decerns: Finds the pursuer (petitioner) entitled to expenses, and remits the account thereof to the Auditor to tax and report.

W. MACKINTOSH.

"*Note.*—The Sheriff agrees with the view of the Sheriff-Substitute as to the effect of the arrestment. It seems clear that as matters stand it attached nothing; and it is difficult to see what interest the pursuer (respondent) has in maintaining it, seeing that the trustee cannot deal with the pursuer's claim (if the pursuer succeeds in constituting it) differently from the claims of other creditors. But the question is whether, *technically*, the arrestment must be supported (for what it is worth) on the ground assigned by the Sheriff-Substitute, that the trust deed may possibly be cut down, or that a surplus may possibly arise payable to the truster. It appears to the Sheriff that in a question of recall of arrestments it is legitimate to look at the matter practically, and if in no reasonable view of the circumstances can the arrestment be operative, the Sheriff thinks it should be recalled. Here it is conceded that the trust deed cannot be cut down under the Act of 1696, because the sixty days have more than expired; nor is there any suggestion on record of any other ground on which it could be cut down; and although it is quite true that a surplus might conceivably arise payable to the truster, it has to be considered that no such surplus could arise till

the pursuer's debt has, with the other debts, been paid in full, and all interest to support the arrestment has thereby ceased. On the whole, the Sheriff thinks that the arrestment was unnecessary, and that the pursuer (respondent) had no interest to lay it on. He therefore feels obliged to give decree of recall, as prayed for. W. M."

Act. Shaw—Alt. Macrae.

Sheriff-Substitute HILL.

MACKENZIE v. SPAIGHT.

Jurisdiction.—"The Sheriff-Substitute, having heard parties' procurators on the closed record, made avizandum therewith, and considered the same, sustains the defender's (first) preliminary plea, dismisses the action: Finds the pursuer liable in expenses, allows an account thereof to be given in, and remits the same, when lodged, to the Auditor of Court to tax and report, and ordains the consigned fund to be paid to the defender. CRAWFURD HILL.

"*Note.*—The defender is a domiciled Irishman, having his ordinary residence in the city of Limerick. The pursuer let to him the mansion-house and shootings of Inverewe from 1st August to 10th December 1882, at a rent of £500, and by a separate arrangement he also sublet to him the Greenstone Point shooting from 12th August to 10th December 1882, at a rent of £80. The defender occupied the mansion-house from 9th August to 23rd October, when the furniture and the effects were taken over by the pursuer, and the defender, with his family, servants, etc., returned to Ireland. It appears from the correspondence produced, that some weeks before this a dispute had arisen between the parties as to the defender's liability for the rent of Greenstone Point shootings, the defender alleging that they did not at all correspond with the representations made by the pursuer as to their value, and on the faith of which he had taken them; and the defender returned to Ireland without paying the rent of these shootings. The present action is brought to recover that rent, and a small balance of furnishings claimed by the pursuer.

"The warrant to cite the defender was executed by leaving a copy of the petition with a servant in Inverewe House, as the officer could not find him personally. This was done on 8th November, *i.e.* about a fortnight after the defender and his family had returned to Ireland. No appearance having been entered, decree in absence was pronounced on 17th November last. This, however, was recalled on 24th November, it having been stated on behalf of the defender that the service copy had never reached him, and that it was only after decree had been pronounced that he heard that any proceedings were being taken against him.

"He now pleads that he is not subject to the jurisdiction of the Court. The pursuer, on the other hand, maintains that there is jurisdiction on two grounds: (1) That at the date when the action was raised there was a subsisting contract between the pursuer and the defender, prestable within the jurisdiction of the Court; and (2) that the defender was then tenant of a house within the county.

"The Sheriff-Substitute thinks that on neither of these grounds can the

jurisdiction of this Court be sustained. It seems to be quite clear from the decisions, that to found jurisdiction against a party in the Sheriff Court on the ground of contract, there must be combined with the existence of the contract the presence of the party within the territory of the judge at the time the summons is served. In *Sinclair v. Smith*, 17th July 1860, 22 D. 1475, the Lord Justice-Clerk (Inglis) held it settled that the tribunals of a county where a contract is made, or to be performed, have jurisdiction to enforce it, *provided* that the party called as defender is for the time, however temporarily, within that county. In *Johnston v. Strachan*, 19th March 1861, 23 D. 758, Lord Kinloch says: 'It is expressly necessary to sustain jurisdiction on the ground of contract in Scotland, that at the time of executing the summons the defender be found personally in Scotland;' and in *Pirie v. Warden*, 20th February 1867, 5 Macph. 497, the Lord President stated the principle on which foreigners are subject to the jurisdiction of the Sheriff of the *locus contractus vel solutionis* to be, that if you find a man in the place where, and at the time when, he has contracted to do a certain thing, you may call in the aid of the local court to compel performance. Now the element of personal presence at the time the summons was served was wanting in the present case. The defender and his whole household had left a fortnight before the summons was left at Inverewe, and if that is of any consequence, it was quite plain that he had no intention of resuming his residence there, because not only had he intimated to the pursuer that he intended to return to Ireland on 23rd October, but the pursuer had on that day taken over the furniture, etc., as it was arranged in the memorandum of agreement between the parties (No. 2 of 7/9) should be done at the termination of the let.

"There is therefore no jurisdiction in this Court over the defender *ratione contractus*. As to the second ground, the defender's tenancy of a house and shootings within the county, there seems to be considerable force in the defender's contention, that although the lease was till 10th December, yet in the circumstances above mentioned it was by mutual consent brought to an end, as regards the dwelling-house at all events, on 23rd October. If this be so, the only property here left in the possession of the defender was the privilege of shooting, and it is a question whether this would found jurisdiction even in the Supreme Court, *Fraser v. Hibbert*, 14th January 1870, 8 Macph. 400. But, however that may be, no possession on even ownerships of heritable subjects will subject to the jurisdiction of a Sheriff a party resident out of Scotland at the time the summons is served. On this point the case of *MacBey v. Knight*, 22nd November 1879, 7 Rettie 255, is direct authority. It was there held that a person resident abroad was not subject to the jurisdiction of the Sheriff of a county either (1) in respect of having heritable property in that county, or (2) in respect of being the joint tenant of a farm therein.

"It was argued in regard to both the grounds of jurisdiction pleaded, that though presence of the party called as defender at the time of serving the summons was formally necessary, it is not required now, because by 39 and 40 Vict. cap. 70, s. 90, Sheriff's warrant may be executed edictally; but the Sheriff-Substitute thinks this would be giving that enactment an effect which was not contemplated or intended.

It has reference merely to citation, and is not to be understood as altering the well-established rules with regard to jurisdiction. On these grounds the Sheriff-Substitute has sustained the defender's first preliminary plea. C. H."

This interlocutor was appealed, but the appeal was departed from, and the judgment of the Sheriff-Substitute has become final.

Act. Anderson & Shaw, Inverness—Alt. Wm. Mackenzie, Dingwall.

Notes of English, American, and Colonial Cases.

INNKEEPER.—*Lien — Taking security — Waiver — Custody of goods detained.*—The mere taking by an innkeeper from his guest of a security for the payment of his bill, does not necessarily destroy the lien which the innkeeper has by the common law upon the goods of his guest; in order to destroy the lien there must be something in the facts of the case, or in the nature of the security taken, which is inconsistent with the retention of the lien, or which is destructive of it. An innkeeper who enforces his lien upon the goods of his guest for the payment of his bill, is in the position of a gratuitous bailee, and is not bound to exercise more care in the keeping of the goods than he would do in the case of his own. —*Angus v. M'Lachlan*, 52 L. J. Rep. Ch. 587.

LANDLORD AND TENANT.—*Right of distress—Common law distress—Distress under deed—Concurrent rights—Marshalling goods seized.*—The common law right of distress, exercisable immediately on default being made in payment of rent, is not destroyed by the insertion in a lease of an express right of distress, extending to articles which would not be affected by the common law right, but exercisable only after the lapse of a certain time from default, if the lease contains no negative words; and, notwithstanding the existence of such an express limited right, the common law right may be exercised immediately on default, but only as to goods to which that right extends. *In re The River Swale Brick and Tile Works (Lim.)*, 52 L. J. Rep. Ch. 638. If in such a case the lessor distrains for two half-years' rent at once, before the expiration of the period after the second half-year's rent becoming in arrear which is fixed by the lease for the exercise of the power therein contained, and some of the goods seized under the entire distress are not seizable at common law, but only under the express power in the lease, the goods seized will be marshalled so as to set against the second half-year's rent in the first instance such of them as are seizable at common law, leaving the remainder of the seized goods to answer the first half-year's rent under the provision in the lease.

WATER.—*Right to flowing water—Riparian owner.*—An action by an inferior riparian owner, to restrain the use of water taken from and returned to a stream by a non-riparian owner, will not lie unless diminution or pollution of the water is proved.—*Kensit v. The Great Eastern Railway Company*, 52 L. J. Rep. Ch. 608. Riparian rights considered.

THE JOURNAL OF JURISPRUDENCE.

LIABILITY OF BANKS FOR SECURITIES DEPOSITED.

THE case of the manager of the London and River Plate Banking Company, charged with the theft of securities to a large amount deposited with the Bank by customers, has been the occasion of an anxious consideration and discussion in banking and commercial circles of the question, What is the liability of banks in respect of securities so deposited?

The manager abstracted securities to the value of nearly £110,000, of which, according to a circular issued by the chairman of the directors to the shareholders, "£70,000 were securities deposited for safe custody, and £40,000 was the value of securities upon which the Bank had made advances." The directors have advised the shareholders as a matter of policy to make good the loss. The questions raised may or may not still come before a court of law, but they have been raised, and being questions of great importance, and affecting vast interests, we take this opportunity of considering them.¹

There is not much, but there is some authority on the subject. The principles regulating the case, or rather the cases, are, however, well established. A banker or other ordinary bailee does not absolutely guarantee the safety of what is committed to him; his responsibility is only for negligence. The degree of care required of banks in the keeping of securities deposited with them, and the consequent liability for failure in that case, varies accord-

¹ At a recent meeting of the Institute of Bankers in London, Mr. Henry Chevassus stated, in reference to the safe keeping of securities by French establishments, that the Bank of France had for a long time undertaken the work. It, however, made a charge for doing so. Other establishments also undertook more or less the keeping of securities. No securities deposited with the Bank of France had ever been stolen from its strong room. Although probably if any securities were taken from them they would consider themselves liable, he thought we might consider that the point of liability had not been settled in France.

ing to the circumstances under which, and the purposes for which, the securities are received into the charge of the bank, out of which various contracts arise. The deposit may be made under various contracts: the contract of deposit, of pledge, of mandate. There appear to be three sets of circumstances under which securities are entrusted to the charge of banks by their customers. First, they may be deposited in security for advances or over-drafts. Secondly, the securities merely for custody, for presumably more safety and protection than the customer's own repositories are likely to afford. Thirdly, securities such as share certificates and, a very common case, bonds with coupons for the periodical interest attached may be deposited, not merely for safe custody, but in order that the bank may collect the interest and dividends as they fall due.

A different degree of care is required of the bank in each of these cases.

In the first case the contract is one of pledge, and the care or diligence required of the bank is of a high degree. There does not seem to be any doubt as to this class of cases, and we may safely dismiss it from consideration.

In the second class of cases the contract is simply one of bare deposit. Usually the customer has a key to the box containing the securities, and he alone has access to them. What is put into the hands of the bank is truly not the securities, but a box containing securities. The position of the bank is just the same as when, as is commonly done, plate is deposited. Nor is it usual for any charge or commission to be made by the banker. The banker is therefore only a gratuitous bailee, to use the term of the English law, and is liable only for gross negligence. Of what gross negligence consists we shall speak hereafter.

When, however, a charge is made for the privilege of deposit, the banker becomes a bailee for reward, and a higher degree of diligence is required of him.

It has been argued that although no special charge is made, the banker is a bailee for reward. This custody of their securities afforded to customers, it is said, has become so usual an incident of banking business as to have become an integral part of it, and the banker receives remuneration therefor in the general profit he makes out of having the customer's bank account. It seems to us that this is not the true state of the case. Such custody as we have spoken of is no part of the ordinary business of a banker. The banker happens to have conveniences for safe keeping which his customers ordinarily have not. It puts him to no inconvenience to give the benefit of such conveniences and accommodation to his customers, and he allows the use of these as a courtesy. But such custody is apart from and extraneous to his business as a banker, and any remuneration he receives from having the customer's account is not to be attributed to the custody he undertakes. The case of the banker is just the same as would be that

of a wine merchant who had a safe when his customer had not, and who was good enough to accommodate his customers with the use of it. One might as well say that in such a case the wine merchant was a custodier or bailee for reward, getting his remuneration indirectly in the shape of his profit on the customer's wine account.

There is a decision directly in point in regard to this class of cases, the case of *Giblin v. M'Mullen* (1868), L. R. 2 P. C. 317, decided by the Privy Council (Lord Chelmsford, Sir James W. Colville, and Sir Joseph Napier being the judges) on an appeal from the Supreme Court of Victoria. The securities being deposited merely for custody, and the bank receiving no reward, it was held that the bank was liable only for gross negligence. The customer deposited in the bank a box containing debentures and other securities. He retained the key of the box. No arrangement was made with the bank as to its safe keeping, and the bank received no remuneration for keeping it. The box was placed in the strong room of the bank along with the boxes of other customers, and securities and specie belonging to the bank. The customers were allowed access to their boxes during bank hours whenever they pleased, in presence of a bank clerk, who merely observed that the customers opened their own boxes, not what they did with the contents. Sometimes this customer took debentures away, cut off the coupons, gave them to the bank for collection, and replaced the debentures in the box. As regards the care taken by the bank of what was in the strong room, the precautions taken by the bank were these: Access to the strong room was only obtained by passing through a compartment where a cashier sat by day and a messenger slept at night. The keys of the strong room doors were kept by this cashier during the day. This cashier stole some of the customers' debentures and decamped. The bank was held not liable. "It is clear, according to the authorities," said Lord Chelmsford, "that the bank in this case were not bound to more than ordinary care of the deposit entrusted to them, and that the negligence for which alone they could be made liable would have been the want of that ordinary diligence which men of common prudence generally exercise about their own affairs." The principle laid down in this case appears to be sound, but we cannot help entertaining some doubt as to whether there was not gross negligence on the part of the bank in allowing their cashier to have free access to the strong room without the control of any one. In a case presently to be noted, in which case, however, the securities were not contained in a box of which the customer kept the key, Lord Justice James spoke of the bank "leaving the securities in the uncontrolled and unwatched power of the manager" as "a gross neglect." Reference was made by Lord Chelmsford, in *Giblin's* case, to the American case, *Foster v. Essex Bank* (17 Mass. R. 478), also noted in *Story On Bailments* (4th

edition, p. 97), where a bank was held not to be responsible, except for gross negligence, for a quantity of bullion similarly deposited. The plaintiff deposited with the bank, for safe custody, a cask containing a quantity of gold doubloons, which was placed with other deposits in a vault in the bank, and the agent of the plaintiff was in the habit of coming to the bank to see that his deposit was safe. There was no evidence how the vault was secured. Whenever the plaintiff gave orders to the bank to deliver some of the doubloons deposited, the cask was opened by the cashier or chief clerk, who delivered the doubloons pursuant to the order. These persons fraudulently took a large quantity of the doubloons and made off with them. It was held that "as far as the bank was concerned, the deposit of the gold was a mere naked bailment for the accommodation of the depositor, and without any advantage to the bank which could tend to increase its liability beyond the effect of such a contract; that the bank was answerable only for gross negligence or for fraud, which will make a bailee of any character answerable, and that gross negligence certainly could not be inferred from anything found by the verdict, as the same care was taken of the plaintiff's property as of other deposits and of the property belonging to the bank itself." The latter circumstance, as we shall see from the case of *Doorman v. Jenkins*, is by no means conclusive that there was no gross negligence.

In a case afterwards to be noted, *In re United Service Co., Johnston's Claim*, Lord Justice James mentioned as a circumstance indicating a liability on the part of the bank for securities entrusted to it, that the deposit was made under such circumstances as would have entitled the bank to a lien upon them for their general banking account. We may refer, therefore, to the case of *Leese v. Martin* (L. R. 17, Eq. 224), as showing *e converso* that the bank is not liable, except for gross negligence, for securities merely deposited with them in such circumstances as in *Giblin's* case. In *Leese v. Martin*, bankers, according to the usual custom in London between bankers and stockbrokers, made, upon the security of share certificates and other property deposited with them, advances to a stockbroker for specific purposes. The bankers were held not to have a general lien upon boxes and their contents deposited with them by the same broker for convenience and safe custody, he keeping the keys of and having constant access to the boxes, and the bankers, mere gratuitous bailees, not knowing the contents of them.

The depositary or bailee in such a case as *Giblin v. M'Mullen* is, it is said, only liable for gross negligence. In many cases the expression and the statement have been objected to as conveying no definite meaning. Regarded as a definition, the expression certainly fails, but it is just a way of saying that there are different degrees of negligence for which different classes of bailees are

responsible, or, to put it in other words, a different amount of care is required in these different cases. The degree of care required in the case of a banker in such a case is, by Lord Chelmsford (repeating what has often been said in regard to such bailees), stated to be this, "that he is bound to take the same care of the property entrusted to him as a reasonably prudent and careful man may fairly be expected to take of his own property of a like description." That a depositor keeps goods deposited with him in the same manner as he keeps his own, gives a presumption against gross negligence, but it does not necessarily exempt him from liability. A man may be grossly negligent as to his own affairs. In *Doorman v. Jenkins* (2 A. and E. 258), a coffee-house keeper, who had taken charge of a sum of money, put it along with a larger sum of money of his own into his cash-book, which he left in the public tap-room of his coffee-house, whence it was stolen. Lord Denman held that the circumstance of his having lost his own money did not exculpate him from the charge of gross negligence. In *Giblin's* case it was admitted that the circumstances of the bank keeping the securities in the same manner as it kept its own would not *per se* have exempted it from liability. In the case of a custodier for hire, the care required is different. "From a bailee for reward is reasonably expected care and diligence such as are exercised in the ordinary and proper care of similar business, and such skill as he ought to have, namely the skill usual and requisite in the business for which he receives payment," per Crompton, J., *Beal v. South Devon Railway Co.* (3 H. & C. 337).

In the third class of cases, where securities are received by the bank, not merely for safe keeping, but for collection of the dividends and interest, the position of the bank is different. The customer does not retain his direct control over, and access to, the securities; they are received by the bank, a receipt is granted for them, and they are kept by it in its own safe, so as to be available from time to time when required. The securities are received by the bank in the course of business as bankers, the deposit is an incident of the employment, and a less degree of negligence than in the cases just considered is sufficient to involve the bank in liability. Here also there is a case in point, *In re United Service Company, Johnston's Claim* (1870), L. R. 6, Ch. App. 212. A customer of a banking company deposited with them some railway share certificates, together with other documents of like character, some with coupons and some without. In consideration of a very small commission the banking company undertook his banking account, and were authorized to receive the dividends on these shares, and to collect the coupons as they became due. The manager of the bank fraudulently sold these shares. As regards the care exercised by the company in guarding these share certificates, it appeared from the evidence that the company kept the securities deposited with them, as well as their own securities, in a strong box in the manager's

room, of which the manager kept the key. This was all the provision made for the safe custody of these and other securities. As remarked by Lord Justice James: "In truth, it appears that without any control, without any care, without any supervision whatever, the securities fell into the power of the manager," who used the shares for his own purposes. The Lords Justices, affirming the judgment of the Master of the Rolls on this point, held that the bank was liable to the customer for the loss of the shares. Lord Justice James observed: "Under these circumstances, the Master of the Rolls was of opinion that the bankers were bailees for reward, and that there was sufficient negligence in the performance of their duty, as such bailees, to render them liable for the consequences of that negligence. In both these conclusions we concur. We are of opinion that this case, on the first point, is entirely distinguishable from the case of *Giblin v. M'Mullen*, where a box containing documents was placed at a bank simply for the purpose of convenient deposit, and the customer alone had access to it for the purpose of placing or removing anything he pleased. In this case, although it is true that the possession of these particular documents was not essential to the collection of the moneys which the bank was authorized to collect, it appears to us that they came into their custody in the ordinary course of their business of bankers, that they were deposited with the bank by a customer of the bank, and that such deposit was made under such circumstances as would have entitled the bank to a lien upon them for their general banking account. . . . We are further of opinion that the negligence of the bank is proved; that leaving the securities of the customers in the way in which they were left in the uncontrolled and unwatched power of the manager, was a gross neglect, and is not excusable or justifiable by reason of the fact that they were equally negligent with regard to their own documents and their own securities." In this case the plaintiff in another action had recovered the shares from the transferees, and the action against the company was only for the costs of making good his claim. The Lords Justices, reversing the judgment of the Master of the Rolls, held this damage too remote, consequently the plaintiff was unsuccessful in his action; but this does not affect the point of the case so far as regards our present purpose.

In this case it will be observed a small commission was charged by the bank. It seems to us that a bank would be liable in this class of cases, although no such special charge is made. It may be said that the bankers are not gratuitous bailees, because a remuneration is obtained in this case, in respect of the profit derived from having the customer's account. This is true, but this is a secondary matter. The point of importance is that the transaction is part of the ordinary business of bankers. If it is, then the general profit derived from having the customer's account is to be regarded as remuneration for the services rendered in the case in question; and

if it is not, then the profit is not to be so regarded. That the whole transaction was part of the ordinary business of bankers, it will be observed was the circumstance upon which Lord Justice James particularly founded. "It appears to us that the certificates came into their custody in the ordinary course of their business;" and this was held notwithstanding the fact that "the possession of the particular documents was not essential to the collection of the moneys which the bank was authorized to collect." In short, the possession was a natural though not a necessary incident of the ordinary course of the business of bankers. If this was held in the case of share certificates, it is not the less to be held in the case of bonds with coupons attached, which require to be detached from time to time.

In determining the degree of care required, and the liability incurred by failure to exercise it, rather too much stress, as we have indicated, is apt to be laid upon the element of remuneration. The main element to be attended to is the element of employment. We do not mean that these are antagonistic, they generally concur; but the element of employment is the determining one, and the main importance of the circumstance of remuneration being or not being given, is as indicative of the nature of the employment and duty. The absence of remuneration does not therefore, we think, necessarily determine that the degree of diligence prestable is of the lowest kind. If a man deposits his watch with a friend who undertakes the custody of it gratuitously, the depositary is only liable for gross negligence. But if he gives it to a watchmaker to repair, and the watchmaker receives it for this purpose, refusing to take any payment, could it be said that the watchmaker was liable only as a bare depositary? Would he not be bound to exercise the same care in the custody as he does with other watches entrusted to him for the same purpose in the ordinary course of his employment?

The case of bills not yet due entrusted to the bank for collection has been referred to, and it has been asked what is to distinguish the present case from that. It seems to us that these cases are not just the same. The position of the banker in regard to bills for collection is similar to his position in regard to the coupons, not in regard to the securities themselves. The securities are entrusted to the bank to be retained for and returned to the customer; it is not so with the bills and the coupons. The liability of the banker is for much less than gross negligence in either case, but the cases are not the same.

A case is mentioned by the *Law Times* (October 13) as to the loss of a promissory note in the hands of a bank for collection, in which an opinion was given by Mr. Benjamin, Q.C., Mr. A. L., now Mr. Justice Smith, and Mr. Crump. An account was opened with a bank, and securities were deposited, one of which was a promissory note, which was lost while in the custody of the bank.

The bank declined to recognise any liability. The learned counsel differed in opinion. Mr. Benjamin and Mr. Crump held that the bank was liable. The relation, it was said, between the bank and the depositor of the note was the ordinary relation of banker and customer, and the banker received the promissory note for collection upon the implied contract to be responsible for the safe custody thereof until maturity, or so long as it remained deposited with them. The return of the note being demanded, it would not, in their opinion, be any valid answer on the part of the bank that the note had been lost. Mr. Smith, on the other hand, was of opinion that the bank received the note on the implied contract that they would use due care in keeping it till maturity, or so long as it remained deposited with them, but did not undertake to be responsible for its safe custody; but that very slight evidence of neglect would suffice to obtain a verdict in favour of the customer. We should have thought that the banker, who is not an insurer, as a carrier is, was not absolutely responsible for the safety of the note, but that its loss raised a presumption of want of due care.

LEGAL PLOT AND INCIDENT IN FICTION.

"LAW," though generally spoken of as dry and repellent, has a popularity of its own. Such an assertion, of course, is not now made of law's technical or scientific questions, which lend it its purely professional charms, nor of its practical interest for men tenacious of their rights and grudging in their duties,—that interest which renders tiresome otherwise companionable people, and which prompts one to shun the owner of salmon fishings as an *ex officio* bore. But even to the disinterested layman law is not altogether unattractive. Its doings have an interest for him apart from the question of how they may directly affect his own pocket. Law bears on almost every relation of social and domestic life, and exerts an unwavering influence on every member of the community. Indeed, we may, without great exaggeration, fancy to ourselves that there is a Spirit of the Law following closely at the back of every one in his daily walk,—invisible and impalpable so long as all goes well, but nevertheless most constantly there, and ever ready to step quietly forward at any juncture, at any turning in the way, to assert itself in his life. And looked at from this safe, removed, and pleasantly spectacular point of view, *i.e.* its influence on unknown *others*, law has always received its own share of popularity.

An important part of the social organism, law is no distant something whose workings ordinary folk never see. Its operation is in the everyday life of everyday people. It comes into direct contact with every man's neighbours. In the mind of the average

citizen, one may safely say, law and the machinery of law's application are at no time very clearly distinguished from one another, and for ordinary purposes are not to be separated. There they form one vague lumbering abstraction, representing the permanent structure which society has reared for its own protection against its constituent units. On the other hand, the special facts to which this "law" is applied are correctly regarded in the same quarter as furnished by these enterprising constituent units. And it amuses society to watch the issues of the various contacts between these two; to note the situations presented by the operation of these steady rules on the lives of individuals. Such contacts and such situations cannot all be dull. It stands to reason that some of them should be interesting to many personally unconcerned in their outcome. And it is to this, so to speak, disinterested interest that we refer when we speak of law's popularity.

Now this popularity is, as a matter of course, mirrored in the literature of fiction.

It would be strange indeed if an institution which is so many-sided as law is did not possess much attraction for every one who cares for the story of human life. By those whose function it is to tell passages from that story such as it *might* be, by writers of fiction, it could not be overlooked. In their hands law has proved a rich quarry out of which many a romance has been built. Scarcely less so than war, which, at all its chronological stages, from the dawn of chivalry to the days of dynamite inclusive, has been so cherished a favourite of romance. War, undoubtedly, beyond all other "institutions," is rich in dramatic situations, both in its stirring progress and in its consequences. Steel, smoke, trumpets, charges, and stretchers; adieux, heroism, desolation, and widowhood—what could fiction do without these? In a less degree romantic, and in a less degree dramatic, but nevertheless both romantic and dramatic in no slight measure, and next after war, comes law.

Entering into all the social and domestic relations of life, it has to do with the so-called romantic passages in lives—with marriage, and with death and descent; with old family histories, peering back to quaint ancestors, and down to posterity; with musty antiquities and with relics crumbling and colourless; with dowers and with dignities. Its sedate functionary comes on the eve of the wedding, he comes again after the funeral is over, recalling men to the cold realities of life, alike from anticipation and from regret. It has to make the acquaintance of all sorts and conditions of men. It gives attendance on philanthropists, and helps donors generally. It has intimate and extensive dealings with every variety of villain, ranging from embezzling clerks with sporting tastes to the perpetrators of the most sickening anatomical atrocities. It looks on askance at commercial disaster, putting in an effective word now and again. Then, too, law is intricate, law is tedious, law is (or

used to be) a mystery to laymen; and so it affords abundant opportunity for knavery and imposture on the part of its adroit practitioners. But it brings, *pede claudo*, the sure retribution at length.

All these, severally, are the materials of many a familiar scene, incident, and plot. The missing deed, in favour of the hero, has caused most people no little anxiety in their day while they have been led through scores of pages in a Quixotic search for it. We have all of us been made to look on at a long series of death-bed scenes in order to note the will-making with feeble hand and flickering mind, and have in general been tantalised and annoyed beyond endurance to see the procrastinating old testator provokingly fall back dead just when he was about to sign, and thereby leave things trim and comfortable; instead of which the punctilious law of intestacy has to be attended to, somebody else gets it all, and we must trudge through a troublesome plot. Then, again, what a sad state of morality would be indicated by the number of pretended marriages related to us by novelists, were any reliance to be placed on these for purposes of statistics! They are "as common as any the most vulgar thing to sense;" although, no doubt, much consolation for our virtuous minds is to be derived from the fact that the tables are so often turned, and it transpires that it was no sham priest after all, no empty ceremony, as the wicked baron intended. Our literature has galleries filled entirely with illustrations of the single subject of mortgage upon mortgage, and the crash of foreclosure, because that is one very rich in scenes and sensationalism. Thus, after the climax, we have ruin, desolation, despair; law proceeds, and gives us the heartrending sale of effects (including the invariable favourite pieces of furniture), and the quitting of the home of one's youth; the sleek lawyer (*sic*, always *sic*!) rolling off gorged with the pecuniary gore of his large-souled dupe (*sic* again!). Or it may be all in milder colours, showing us only the festive prodigal of bygone days, with his convenient bill, ending in the sponging-house, whither Dickens and Thackeray like so much to wander. Then, in all denouements worthy of the name, law plays a leading part; retribution, *pede claudo*, arrives just in time; and while virtue, vindicated and triumphant, declaims morality of a high-sounding kind, law's minions (in the mufti garb of detectives, it may be) appear with handcuffs to remove baffled villany. Lastly, no one with healthy eyes can have failed to pass many a thrilling hour before the vivid and telling pictures of criminal trials which novelists have painted for us. These treat of every variety of respectable crime, every species of charge that may be tried without closed doors; and the figure common to them all is the innocent victim of circumstances. All these are the unquestioned property of scribblers great and small, and of that property they have availed themselves largely indeed. Comedy and tragedy both bristle with such incidents.

These rival moods find each their materials ready to hand, for emotions the most widely dissimilar are called up by this operation of law.

It is perhaps more in the form of incident than in the form of plot that law has appeared in fiction. In the form of incident its more familiar workings are frequent intruders. But a plot mainly, or even wholly, legal in its character is by no means rare. The legal elements in it are most commonly of a popular kind, involving only such legal doctrines as the ordinary reader may fairly be presumed to be acquainted with. The effect of a missing deed, or of a pretended marriage, for instance, may be to put things so much out of joint that two and a half volumes are scarcely adequate to set matters right again. Sometimes, however, a rather more recondite legal doctrine is worked into a novel as a design, and the public are taught some law as well as amused. Many examples of this will occur to the mind of the reader. To take one at random. In Mr. Wilkie Collins' novel, *No Name*, the story turns mainly on the principles of English law,—that a subsequent marriage *ipso facto* annuls a will, and that bastards are not made legitimate by the subsequent marriage of their parents. A wealthy man, Vanstone by name, has lived for many years with a woman as his wife, having been prevented from marrying her because he has a dissipated and disreputable wife still living. To the two daughters who are the issue of this connection he is much attached, and has made a will in their favour. After these two ladies have reached womanhood, in ignorance of their true status, the objectionable wife dies, and then, unknown to them, their father goes through the ceremony of marriage with their mother. Made aware of the rule of English law, that his will has thereby been rendered void, Vanstone is proceeding with all haste to execute another in similar terms, when he is killed in a railway accident, on his way to visit his lawyer for this purpose. Then the novelist follows the fortunes of these young ladies, thus deprived of their expected fortunes (which go to distant relatives), and branded with the character of bastardy. We may take another example of this from *Felix Holt*, by "George Eliot." In that story the author brings in the principle of English law, familiar to Scotch minds under a less barbarous nomenclature, that the holder of an estate for life in land may dispose of his interest to another, who is then said to hold *pur autre vie*, his estate terminating with the death of the *cestui que vie*, and the tenure of a wide domain by a proud family is made to depend on the precarious life of a dissolute bill-poster.

Sometimes, again, it is a mere quibble or legerdmain of the law that is introduced; a knotty point, and a wise solution of the same. As an instance of our meaning, we may recall to mind (*not* from the realm of fiction) the juggling justice of Solomon in the matter of the disputed child. One example will readily occur to most minds — Portia's ingenious quibbling in *The*

Merchant of Venice. Examples of this use of legal incidents in fiction might be multiplied *ad libitum*. Let us quote only one. It is an incident from *Estevanille Gonzalez*, by Le Sage—a work probably not so much read in this country as its brother from the same pen, *Gil Blas*. The scene is in Palermo, where a complaint, to the following effect, is laid before the governor, the Duke of Ossuna. The defender, Giannetino by name, thus tells his story: “Six months ago, Charles Azarini, Peter Scannati, and Jerome Avellino, merchants of my acquaintance, came to me with a notary, and a sum of ten thousand crowns in gold. ‘We have chosen you,’ said they, ‘to be guardian of this money, which we want to put on board a ship when we find occasion. In the meantime we wish you to take charge of it, and to give us a written promise that you will not deliver it to any one of us, but in the presence of the other two.’ I willingly bound myself, therefore, by an agreement, drawn up by the notary, which we all signed; and I carefully preserved the deposit, to be returned to the three associates when they should demand it. A short time ago, Jerome Avellino knocked one night at my door, and, when it was opened, he burst into my room in great agitation. ‘Signor Giannetino,’ said he, ‘if I disturb you out of your sleep, you must excuse me on account of the important occasion which makes it necessary. My two associates and myself have learned that a Genoese vessel, richly laden with merchandise, upon which we can make a great profit, will soon be at Messina; and we have determined to make use of the ten thousand crowns you have of ours. Give them to me instantly, then, if you please; my horse is at the door, and I die with impatience to be at Messina.’ ‘Signor Avellino,’ answered I, ‘you seem to have forgotten that I can only deliver them in the presence of all three.’ ‘Oh yes,’ interrupted he, ‘I remember very well that it is so in the agreement, and that you are only to deliver the money when the three associates are together; but Azarini and Scannati are ill, they cannot come with me to you; they entreat you as well as myself not to mind the agreement, but to deliver the money directly. The moments are precious; you have nothing to fear, I am an honest man; and I cannot suppose that, by a want of confidence which is revolting to our friendship, you will cause us to lose so good an opportunity. Make haste, I conjure you; I am impatient to be at Messina.’ Heaven, which no doubt secretly inspired me, made me hesitate for a long time ere I gave up the money; but Avellino, the wily Avellino, entreated me, pressed me, tormented me to such a degree, that he at last overpowered my reluctance, and I had the folly to comply with his request. . . . Avellino is unfortunately at a great distance from this place; and, what is still worse, Azarini and Scannati no sooner heard of the roguery of their associate than they came thundering to demand the money.” These were the facts of the case, and this is how the Duke dealt with them.

"Giannetino," said he, "what answer have you to make to your adversaries?" "None, my lord," said Giannetino, bowing his head lowly. "He is right, gentlemen," said the Duke, addressing himself to Azarini and Scannati; "he has no answer to make to you, and is ready to deliver to you the ten thousand crowns deposited with him; but as, according to the agreement, he cannot deliver them but in the presence of the three associates, bring Avellino back to Palermo, and you shall receive them."

Only one other feature of the subject seems to call for notice, and to it some allusion has already been made. We noted that in criminal trials, as they occur in works of fiction, the person in the dock is almost invariably the unfortunate victim of circumstances. This may be stated more broadly. Many, if not most, novelists are, as regards law, zealous casuists. In all likelihood they glide into such a course unconsciously, without knowing or feeling that law is at all harsh in its comprehensiveness. But they have constituted themselves the advocates of this school of casuistry, and their eager pleading on its behalf is a shape in which legal incidents often present themselves to our view in works of fiction. In illustrations of this the works of Dickens are perhaps the most prolific, abounding as they do in Charles Darnays and Oliver Twists, and including State trials for treason, summary procedure before magistrates, and many ranks of trial between these two extremes. Selecting hypothetical cases of hardship to individuals, they provide themselves with powerful situations. They harp on the same string—possible miscarriage of justice. They would have the rigidity of rules soften to meet fantastically conceived contingencies. They would not have law so sweeping and unbending; justice must be a machine of marvellous delicacy, adaptable to every abnormal case, where presumptions go for nothing, appearances for less, and where rational inferences are utterly at fault. This is the casuistry which Dickens preaches, and no one can preach it more eloquently than he. Having enlisted our interest in the negative milksop whom he chooses for a hero, he involves him in a network of worse than suspicious circumstances, the result of a conspiracy of mischances such as, humanly speaking, could not occur. He gets him into court, and then he omits to apply imaginary justice to an imaginary case. For a combination of circumstances so far outwith the region of human probabilities and presumptions, the novelist ought in fairness to create a court exceeding to a corresponding extent the skill and penetration of humanity. But to heighten the effect he must preach this casuistry. Justice is represented as a machine of too gross parts to deal with material of such exquisite fineness as the hero's case.

If, then, law were to withdraw from fiction's motley collection all that has been borrowed from herself, many would be the gaps so made. That, fortunately, is impossible. Fortunately, because

fiction does more than merely amuse (which is her proper part); she keeps, as it were, a historical museum in which are preserved relics from various ages,—relics which, but for her, would be lost to the world. Law, like other institutions, hurries on to improve and simplify itself. It strives to get rid of its oddities and all its quaint and fascinating clumsiness; and of these, when once abolished, faint traces linger on law's own pages. But fiction keeps them fresh for us; not in the disembodied form of dry legal antiquities, but as living and natural, as the scenes in which characters with whom we are made most intimate live and move. And so law, justifiably proud of its antecedents, but wanting the skill and leisure to do more than record the dates and facts in the family history, cannot but feel grateful to fiction for painting the family portraits.

THE COURT OF SESSION IN 1819 AND 1820.

BY A PARLIAMENT HOUSE CLERK OF THAT PERIOD.

FOURTH ARTICLE.

DURING session time the heads of the law firms were always to be found in the Parliament House during the forenoons, and seldom, unless by special appointment, in their office. The most of correspondence and general business was transacted in the afternoons and evenings. All the clerks' closets or chambers were open in the Register House in the evenings, and the "Fee Fund office," where all papers were paid and marked before being received by the clerks. Mr. Marshall was receiver of the fees, which were very high. An office with considerable practice seldom had less than £4 to be paid every night during session. It was a great convenience that the bank of Sir William Forbes & Co., with which the majority of the profession dealt, had its office then in the same building as the Court of Session in Parliament Square, and remained open in the evenings, during which time most of its business was transacted. With few exceptions, the professional clerks were solely paid by their writings. The junior clerk had the duty of copying all letters in the letter-book, and his allowance for each letter was the odd fourpence. It was wonderful how, in many offices of large business, this fractional pay amounted during the session to a handsome sum. In the evenings memoranda to counsel as to motions on the Rolls for next morning were prepared, and had to be delivered at the house of the advocates the same evening. This, with the correspondence, compelled the clerks to be detained late in the office. One of the clerks had the duty of posting the letters for next morning's early post. The post office was then in the large

tenement immediately on the west of the North Bridge. It was usual for several of the clerks to associate themselves in the posting of the letters, which was generally at a late hour. It was not unusual, after the business of the day, for the gentlemen thus associated to adjourn to the well-known and well-frequented tavern of Ambrose, in Gabriel's Road, to the west of the old Register House, and there partake of a frugal supper in the shape of a Welsh-rabbit or rare-bit (for which the house was famed), with a draught of foaming porter served in a pewter jug.

The offices of the profession were much scattered throughout the city. Some lingered in Argyle Square and George Square, and a considerable number had their offices in Princes Street. But perhaps the greatest number of offices was to be found in Forth Street. There was the office of Todd & Wright. The former was proprietor of an estate in the kingdom of Fife called "Cash." The other partner was the son of a minister of Scone, and was a party to a case in the House of Lords with the Earl of Mansfield, where the laws and regulations as to places of sepulture were defined by Lord Eldon. In the same street was the office of John and William Murray. These gentlemen were married to two sisters. One only had a family, and they dwelt harmoniously in the same house, each in rotation every month becoming the head of the house. All the gentlemen named had large business, derived from several localities of the country. But the most extensive practice was conducted by Daniel Fisher, S.S.C., Forth Street, chiefly derived from Glasgow. It was of considerable importance, and there was no small difficulty in obtaining a situation in that office. Several leading advocates, who subsequently became judges of Session, passed some time in it. Mr. Fisher was a native of Stirling; and a brother held for many years the office of Extractor in the Burgh Court of Glasgow, which at that time under the able assessorship of Mr. James Reddie had a very large business. Mr. Daniel Fisher married a daughter of Mr. Dickson of Knightswood, which brought him into contact with the merchants of Glasgow. Unfortunately, after the death of his father-in-law there was litigation as to the division of his estate. Many important questions as to fixtures and moveables, and others as to legitim, were settled in this action. Meantime Mr. Fisher, who had removed his office to St. Andrew Square, never regained the amount of business he once enjoyed in Forth Street.

NESTOR.

A PLUCKY LORD ADVOCATE.

ON June 6, 1804, a motion was made by Mr. Whitbread, in the House of Commons, for the production of certain public records of

the county of Banff, in Scotland, relating to the Lord Advocate's conduct towards a farmer of that county named Morison, who, it appears, had discharged a man from his service because the latter had attended at the muster and field day of a corps of volunteers to which he belonged. The man drew up a memorial, of which the following has been published as a copy: "Memorial for Robert Garrow, private volunteer in Captain John Macbean's company of the 2nd battalion of Banffshire volunteers.—That the memorialist was regularly engaged to serve James Morison, farmer, in Whyntie, for the half-year commencing at Whitsunday last, at six guineas of fee; and the memorialist accordingly entered home to Mr. Morison's service, in terms of his agreement, at that term.—That some time thereafter the memorialist enrolled himself a volunteer in the said company without having previously obtained the consent of his said master for doing so, and continued to attend punctually at drill with the company, after his ordinary work was finished, in the evenings, until the 13th October last, when, to his great surprise, Mr. Morison discharged him from his service, because the memorialist had gone to Cullen on the day preceding, without his master's permission, to attend in his place at the inspection of the company, by Major-General the Marquis of Huntly, and that although the memorialist before he set out to join his company, and also when he was dismissed as aforesaid, offered to make ample recompense to Mr. Morison, in work or in money, for the loss of his labour during his necessary absence on duty in His Majesty's service at the inspection of the said battalion.—*Quæ*. Will the memorialist, under the above-mentioned circumstances, be well founded in an action against Mr. Morison, of his said stipulated fee, and for wages besides, since the said 13th day of October, when he was dismissed from his service as aforesaid, until Martinmas last? or would counsel rather advise the memorialist to restrict his claim against Mr. Morison to payment of his work from the said term of Whitsunday last to the said 13th October? In short, the memorialist is desirous to know if or not he has any claim against his said master, and to what extent?" This memorial, Mr. Whitbread stated, was submitted to the Lord Advocate for his opinion thereon, which opinion was given in the words hereafter to be seen, followed by a letter from the Lord Advocate, upon the same subject, to Mr. Forbes, the Sheriff-Substitute of Banffshire; and in consequence of which letter the Sheriff-Substitute recommended a copy of it to be sent to Mr. Morison by the Sheriff's clerk, who was ordered to keep the original in the record of the Court. The Sheriff's clerk did as he was recommended; and he accompanied his communication to Mr. Morison with a recommendation to make the complainant, Garrow, as handsome an allowance as possible, as being the best means of removing the severity of the Lord Advocate's opinion. With the aid of this short introduction, the papers will speak for themselves.

“OPINION.—However unprincipled and oppressive Mr. Morison’s conduct seems to have been, I am afraid that the memorialist has no claim against him, except for wages up to the day that he was dismissed from his service, to which he is certainly entitled. The opinion of
C. HOPE.

“EDINBURGH, *Dec. 29, 1803.*

“EDINBURGH, *Dec. 30.*

“SIR,—I return you the memorial with my opinion; and in the circumstances of this case I decline taking any fee, which I also return to you. The case in the memorial is one of those for which, unfortunately, no provision is made in any of the Volunteer Acts, and therefore, of course, a person who neglects his master’s work, on account of attending drills or reviews, is, I am afraid, in the same situation with a servant doing so from any other cause. The conduct of Morison, however, is most atrocious, and every possible means ought to be taken to stigmatize him, and to punish, by the scorn and contempt of all the respectable men of the country, who ought to enter into a resolution to have no communication or dealings with him whatever. And further, as I consider that Morison’s conduct can only have arisen from a secret spirit of disaffection and disloyalty, it is my orders to you as Sheriff-Substitute of the county, that on the first Frenchman landing in Scotland you do immediately apprehend and secure Morison as a suspected person, and you will not liberate him without a communication with me; and you may inform him of these my orders. And further, I shall do all I can to prevent him from receiving any compensation for any part of his property which may either be destroyed by the enemy, or by the King’s troops, to prevent it from falling into the enemy’s hands.—I am, Sir, etc.,
C. HOPE.

“Addressed to GEORGE FORBES, Esq.,
Sheriff-Substitute of Banffshire.”

“I recommended to the Sheriff’s clerk to transcribe this letter, and send the copy to Morison, keeping the principal in the record of Court.
G. FORBES.”

“BANFF, *Jan. 4, 1804.*

“SIR,—In consequence of what is above stated, the before-written copy has been made out, and is now sent you. I regret you should have exposed yourself to so much censure, and would recommend to you the propriety of settling with Garrow, by making him as handsome an allowance as possible, as being the best means of removing the severity of the Lord Advocate’s opinion.—I am, Sir, your most obedient servant,
PAT. ROSE.

“To Mr. MORISON.”

Mr. Pitt, in answer to the speech of Mr. Whitbread, began by saying that he had no intention to object to the papers moved for;

but, on the contrary, should be glad to see them before the House, being convinced that the construction which had been put on them was more than they would fairly bear. He begged the House not to be prejudiced from the statement they had heard, but to consider the matter impartially, as being a question of the utmost importance. The conduct of the Lord Advocate, he believed, had proceeded from the purest motives of public zeal, and not from any personal malice. He considered it as the purest zeal, operating upon a strong and ardent mind; and it would remain to be considered how much the public ought to be interested in one who has been the uniform champion of the constitution, and who has given so many proofs of his patriotism and public spirit. Mr. Pitt expressed his wonder that this matter had not been brought on sooner, seeing that the subject of the complaint existed in October, and seeing that the Lord Advocate had attended his duty in Parliament since that time.—Mr. Fox observed, that whatever might be the motives of the Lord Advocate, in the conduct he had on this occasion pursued he thought that if no better argument could be found in his favour than that of an ardent mind, his case must be desperate indeed. What, said he, shall ardour of mind, in a highly responsible character like this, be an apology for flagrant injustice? In this very House, where we have so often been reminded of the extravagances and miseries of the French Revolution, what sort of apology will an ardent mind afford for outrages offered to justice, to decency, to everything sacred in domestic and social life? That an investigation into this subject has not been made sooner, said he, must be attributed to consequences of which oppression is not unfrequently the cause. The oppressed are afraid, and, in many cases, incapable of complaining, in proportion to the weight and injustice of the oppression.

On the 22nd instant the matter was regularly brought before the House of Commons by Mr. Whitbread, who concluded his speech with moving a resolution to the following effect—"That the conduct of the Right Hon. Charles Hope, in writing the said letter, was illegal, oppressive, and contrary to his official duties." After a long debate, in which the Lord Advocate defended himself, and was supported by the Attorney-General (who moved the order of the day by way of amendment), Mr. Dallas, Mr. W. Dundas, Lord Castlereagh, Col. Vereker, and Mr. Pitt, and in which the original motion was contended for by Lord Archibald Hamilton, Mr. Grey, Mr. Kinnaid, Mr. W. Smith, Mr. Windham, Lord Henry Petty, Sir John Newport, and Mr. Fox, the House divided, when there appeared for the order of the day 159, against it 82: majority 77. The Lord Advocate, in a bold tone, called for a decision of yes or no upon the original motion. From the Lord Advocate's speech, when it comes to be published at length, it will appear that his powers in Scotland are fearfully great and extensive; the very description of them makes us Englishmen hug ourselves and bless

God that we were born on this side the Tweed. It appears that the opinion was given by the Lord Advocate as a private counsellor-at-law for a fee, but which fee he on this occasion returned ; and that the letter to the Sheriff-Substitute was written by him in his public capacity. The bringing forward of Mr. Morison's complaint, if it has no other good effect, will have that of showing how dangerous it was even to propose to interfere between masters and servants, relative to the attendance of the latter in volunteer corps. The clause which was introduced for this purpose into the Bill called "the Volunteer Consolidation Bill" was thrown out in the Lords, and well for the country that it was, or there would have been something bearing no very distant resemblance to a dissolution of society. This was a favourite clause of Mr. Pitt, who insisted that it was a capital mistake to consider all the time of the servant, or the apprentice, as belonging to his master. This was another wild, undigested scheme, a mere whim, a showy fancy. Had it become law, every master would have been at the mercy of the nearest-living pettifogger. All would have been wrangling litigation. The system, if it can be called one as it now stands, is productive of ill-blood, idleness, loss, and mischief enough ; but what would it have been if the masters of servants and apprentices had been compelled to share their authority with the volunteer colonel or captain ? As to the particular case of Mr. Morison, it is not pretended that he acted unlawfully, and that he acted harshly or unreasonably we have no better proof than the word of the other party, the very servant whom he turned away for neglect of duty and disobedience of orders. It appears that Garrow had attended the volunteer drills for four months ; can we suppose, then, that the master would at last have turned him off merely for attending the drill ? Is it not evident from the history of the whole transaction that the servant must have been guilty of some gross neglect or insolence ? Besides, suppose that Mr. Morison did not approve of the volunteer system. Suppose he regarded it as the most dangerous institution that could possibly exist. Suppose him to believe that the arms, if suffered long to remain in the hands of the volunteers, would never be taken out again except by means of a civil war. Suppose him to have been deeply impressed with this opinion, it then became his duty, not only to discharge a man who neglected his business to go a volunteering, but to prevent, as far as in him lay, such man from going a volunteering at all. He was disobeying no law, nor would he have been, had he made it his business to dissuade all he came near from joining volunteer corps. "My mind," said the Lord Advocate in his speech, "is probably not properly constructed, but let me ask if a person had sold himself to the service of France, and were to put the question to the First Consul, how he could best serve him, what should be the Consul's answer ? ' You live in a remote part of the country where you can expect little aid from the

regular force, which must necessarily be kept near the capital. Intelligence you can send me none ; therefore the most essential service you can render me is, to do everything you can to discourage, impede, and defeat the volunteering.' If therefore," added he, "Morison had been in the direct pay of France, he could have done nothing more effectually to serve it than he actually had done." If we admit the premises, the conclusion is just ; but we do not admit them. Buonaparte would have said no such thing ; he would, on the contrary, have been angry with Mr. Morison for discouraging the volunteering, and perhaps he regards those as his best friends who have been the most zealous and successful in the advancement of that system. It is, at least, matter of mere opinion, and Mr. Morison had as good a right to follow his opinion as the Lord Advocate had to follow his. What ground, therefore, was there for suspecting that from the circumstance of having dismissed Garrow, Mr. Morison was a disaffected person. Yet it appears that this suspicion was the chief ground alleged for the terrific letter from the Lord Advocate to the Sheriff-Substitute. The part of the Lord Advocate's speech which relates to this point is too curious not to be cited : "I was not," said he, "ignorant that there had existed at Portsoy, within a mile or two of the place where Morison lived, a society called 'The Society for Universal Liberty,' founded on the principle of never ceasing to promote their chimerical and visionary plans so long as a member of it existed. The conduct of this society had been such as to induce the Sheriff to inform them that he must have the honours of the sitting at their future meetings, and on this notification they had thought proper to dissolve. That they did, however, continue to meet in small parties for seditious purposes, and that one of their objects was to discountenance and discourage volunteering among servants, was known. I was well aware that the *primum mobile*, the principal instigator and promoter of this society, was a person very likely to have an influence over Mr. Morison. What then was I to think when I saw him so wantonly and undisguisedly impeding the public service, but that he was one of the persons who had adopted this as their grand and systematic object ?"

FUNCTIONS OF A PROSECUTING OFFICER.

I. *The Office.*—At common law, all criminal accusations against the person or property of individuals were instituted and urged at the instance of private persons, each of whom paid and employed counsel to conduct the trial. Various inducements were provided for by statute to prompt the prosecutor to commence proceedings, and, if possible, secure a conviction of the offender. He was allowed his expenses when the prosecution was conducted in a *bona fide* way,—which seemed to the judge meritorious,—and when

the accused was convicted in cases of larceny the prosecutor was to have restitution of the goods. The purpose of these provisions was to induce those who were the victims of criminal offence to prosecute and punish the trespasser. To further encourage the practice, it was held any private injury amounting to a felony was merged into the latter, and until a prosecution was instituted, and resulted in a conviction, no action would lie for the private wrong. But under our present system there is no merger of the personal injury in the felony, nor does the civil remedy necessarily remain unsatisfied until the criminal has been had. In the United States, the prosecution of criminal offenders is under the control of a sworn public prosecuting officer, who usually conducts the cause on the trial, and before the court in its various stages, and, with but few exceptions, before the grand jury also.

The selection of this functionary is generally made from the ranks of the legal profession, to fully comply with the object the laws providing for the office had in view, and that he might be the better suited to perform the duties appertaining to the office. In the capacity of prosecuting attorney he becomes the representative of the people, acting as their agent in causes in which they may be interested. It is the policy of the law to throw around prosecuting officers such safeguards as will prevent their being influenced by other than the most proper motives. Counsel for the people in a prosecution is responsible only to the public, and is in no degree under the control of the injured party; hence there is no longer an opportunity for private individuals to instigate a prosecution merely to gratify personal malice, or obtain private redress to the subversion of good morals and justice.

Since the office is now entirely a creation of the statute, so the statutes have defined, as nearly as possible, what the powers and duties of the incumbent shall be, and decisions, if they were more numerous, would undoubtedly fail to give a correct idea of the precise track to be followed in each case. To make a rule that would serve as a guide in the many varying phases of a prosecutor's office would be well-nigh impossible. Criminal trials of the present day are carried on in a widely different manner than they were when the accused was compelled to act as his own counsel, and was denied a copy of the indictment. The advancement that has been made in this respect will be the more obvious by a comparison of some of the older cases with those of the present time. None is, perhaps, more illustrative than the trial of Sir Walter Raleigh for high treason. The opprobrious epithets of Attorney-General Coke, founded upon little or no evidence, convince the reader of the gross unfairness of criminal practice existing at that time.

It is not required that the labours of the prosecuting officer be confined exclusively to the prosecution of criminal offenders, although these are more common. Attention to civil suits for or

against the county or State, or in which it may be interested, are, among his other duties, indicated by the statutes. Provision is oftentimes made that he shall give his opinion upon questions involving the interests of the people to any officer in the discharge of his official duties; that he shall receive no fee or reward from any individual for services rendered in which it shall be his duty to attend; to prosecute no suit for the public in which his law partner shall be the attorney for the defendant, and other regulations which vary in the different States. In this country the prosecution is by the people, who constitute the real plaintiff, and suit is carried on by them under the title, The People, The State, The Commonwealth, or the United States. In England the Queen prosecutes, the Attorney-General being, in strictness of law, merely her attorney, representing her in the same manner that any client in a private matter is represented by his attorney.

The office may be filled in any way provided by law, usually by election or appointment, and is limited to a certain jurisdiction and period of time. It is seldom required that the Prosecuting officer follow a case into the appellate court; the Attorney-General is appointed for this purpose, and presents the cause of the people at the hearing in the court of last resort.

II. *Classes.*—In the United States there are two classes of prosecuting officers: those selected to serve under the general government, and those selected to serve under State governments, and both State and Federal legislation has expressly provided for the office. In a broad sense, the two are synonymous, although their duties, as defined by statute, are different. The former is affirmed, or sworn, to the faithful execution of his office, and his duty is defined to prosecute all delinquents for crimes and offences cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned; while the latter's sphere of action is exclusively under State control, in the district for which he is chosen, and very rarely can he be called upon to perform any labour pertaining to his office outside. It has even been decided the State's attorney in one district cannot be required or empowered to perform official duty in another district.

In so far as they are the servants of the public, a similarity exists, but in respect to the crimes they are to prosecute, the manner of selection and qualifications they are to possess, the difference is a wide one. The United States district attorney is the only channel through which the Federal Courts can have communication with the executive department of the general government. When there is no district attorney in commission, the United States cannot prosecute in the District Court, it being only through the presentation of his commission that the Court can know who is the proper legal officer to represent the United States.

III. *Qualifications.*—The office of public prosecutor being created for the purpose of providing a representative for the people in the different actions in which they may be engaged, the law requires that he who occupies it shall possess certain qualifications, in order that their interests may not be neglected, either through ignorance or carelessness. Many of these have been defined, and so far are comparatively easy to ascertain ; but in other cases, what elements are necessary to be centred in the prosecuting officer to ensure his competency to perform the requirements of his office is a matter of individual opinion, or, at most, depending upon moral law. Singular it is, that in the Constitutions of most States no provision has been made that persons selected for the office of prosecuting attorney should be men learned in the law, and rendering them ineligible unless admitted to practise as attorneys. However, there are exceptions to the rule. In Kentucky he must have been a licensed practising attorney of two years' standing ; in Maryland it is required that he shall be admitted to practise law in the State, and have resided two years in the county. Probably, also, under the Constitutions of South Carolina and Tennessee, it would be held that one not an attorney at law would be ineligible. So, by Act of Congress, it is provided that the United States district attorney shall be learned in the law. This would, presumably, be construed to mean one admitted to the Bar.

Aside from express regulations on the subject, the authorities are not harmonious as to whether he should be a licensed practising attorney. Some decisions are to the effect that he should, while others hold that it is not essential that he be an attorney, or admitted to any courts of the State. Conceding that the prosecuting officer need not be an attorney at law, according to strict legal interpretation, yet it is advisable in all cases to determine that that functionary possesses this qualification. Such an one, it will be admitted, is better capacitated to serve because of his being more familiar with practice and the rules of law, and is better prepared to carry out the design of the law in creating the office. All other considerations being laid aside, the one who has taken an oath to conduct himself faithfully in the office of attorney, is to be preferred to the one who has assumed no such obligation. The remarks of Mr. Bishop upon the choice of men to fill this position are apt and outspoken. He says : " This officer has great power in his hands ; he may practically, in almost every case, prevent the grand jury from finding an indictment, as he always, or nearly always, in practice draws the indictment. And after it is found he may refuse to pursue the accused if he will. Such an officer ought to possess that element essential to the character of a truly great lawyer, integrity to the highest degree. He ought to possess the highest qualifications of learning and exactitude of mental habit. A man of this sort need never permit an offender to escape by reason of any defect in the indictment, though the judges should

hold him to exact rule. And if the Government, or the people, as the one or the other has the appointing or electing power, sees fit to confer the office on some man whose qualification is that he can bawl loudly and long before his countrymen, met to determine what candidates shall be put in nomination for office, surely, though criminals escape through his blunders, it does not become Government or people to complain."

IV. *Duty before Trial.*—To the duty of a prosecuting attorney in the steps preliminary to the trial, we are now briefly to turn our attention. It is an extremely important and delicate portion of the work designed for this officer to perform, and the good or ill qualities which he possesses will surely be exhibited in one direction or the other. Nearly every day some case occurs in which it is necessary for the prosecuting officer, and for him alone, to decide whether a prosecution shall be dropped or carried on. Possibly a crime has been committed, but it may be of such a nature, or committed under such circumstances, that justice is better served by the officer declining to prosecute. A charge for a technical crime, where there has been no violation of the real spirit or intent of the law, should not be urged against a man with the same vindictiveness that it should against one who clearly was contemplated by it, and who wilfully trespassed it. If in such case the officer, instead of refusing to institute proceedings, insists upon carrying them on, he not only injures the prisoner, but also the community at large. In place of a good being thereby done, it accomplishes, indirectly, the reverse. An offence may be so trivial that his duty will be to pass it by unnoticed; as a private individual disregards certain wrongs which, from their nature, are punishable, but as a matter of public and personal policy, they are better left unavenged.

It becomes the duty of the prosecuting officer to determine, before the cause is tried, not only whether the party accused can be convicted if prosecuted, but also whether the public interest requires the prosecution to be carried on. As was observed by a writer upon criminal law: "On the one hand, no man is to be punished unless he deserves punishment as a matter of pure retributive justice, aside from all extraneous circumstances; while, on the other hand, though a penalty be merited, it will not be inflicted by the governmental powers which do not assume the full corrective functions of the Deity, unless a public good may thereby be done." The power of discontinuing cases possessed by the counsel for the people is not without limit, and in certain instances, although he may be reluctant to carry on the prosecution for excellent reasons, yet this will not excuse him from discharging his duty. Thus, the pardoning power can only be exercised by the executive, and although the prosecuting officer may think the prisoner ought to be pardoned, he is not justified in refusing to proceed with the prosecution. Again, the power to make and repeal laws is invested

in the Legislature, and with this the prosecuting officer is in no way concerned. His duty is merely to see that the laws thus enacted, pertaining to his department of the Government, are properly enforced. If, then, the law says a certain crime must be prosecuted and punished in a certain way, it is his duty to institute proceedings and carry them through, although he may deem the statute unjust and mischievous. His duty in these cases is imperative, and even though his own mind tells him the law will act with inequality, he cannot hesitate to bring the offender to justice. The power of altering an unwise statute lies solely with the Legislature, and cannot be interfered with by the prosecuting officer. Although a wide discretion is delegated to this officer, anything which will operate to the prejudice of the rights of the public he is prohibited from doing. For instance, he can make no valid agreement not to prosecute an offender. Perhaps a distinction should be observed between crimes of a public and those of a private nature, in regard to compromising cases of this character. Still it has been decided that if a crime be in whole or in part of a public nature, no agreement to stifle a prosecution therefor can be valid. Another method often adopted by the attorney for the State, when proceedings have been commenced, is to discontinue by *nolle prosequi*. This writ is a withdrawal of the present proceedings on a bill or indictment. Some changes in reference to it have been made by statute, but it is not necessary in this connection to note them.

According to the common law it might be at any time entered, and is not only no bar to a prosecution on a subsequent indictment, but may be so far cancelled as to permit a revival of proceedings on the original bill. But the case is different when a jury has been empanelled and sworn to try the issue, and witnesses have been sworn. Then the prosecuting officer has no right to enter a *nolle prosequi*, and an abandonment of the case under such circumstances is equivalent to an acquittal. There appears to be some variance of opinion as to just how far a cause may have proceeded before a *nolle prosequi* may be entered; but we shall not attempt to trace out the distinction. As to whether the public prosecutor may enter the writ without the acquiescence of the judge before whom the cause is to be tried, there is also much doubt. Oftentimes this matter is regulated by statute. The import of several cases has been that the power of discontinuing suits against criminals, by means of this writ, belongs solely to the counsel for the people, and cannot be interfered with by the Court. So, also, in North Carolina, the attorney-general had a discretionary power to enter a *nolle prosequi*, and the Court will not interfere unless it is oppressively used; while a few cases have considered this view erroneous, and held the consent of the Court necessary.

In some States it is also essential to the validity of an indictment that it be assented to and signed by the State's attorney;

but this is so seldom necessary that it can scarcely be said to be a general rule. Should investigation prove the prisoner innocent of the crime charged, the prosecuting officer should at once order a cessation of all proceedings against him. Too frequently, much as it is to be regretted, counsel for the people, either through pride or other motives, urge a prosecution they know to be utterly without foundation. Having once commenced, he is disinclined to leave a case while there remains the slightest chance of a conviction. Justice should never be sacrificed to any pride of professional success which may seem likely to flow from the result attained. The practice of deciding upon the merits of a prosecuting officer by the number of convictions he secures is a custom not to be recommended. At best it can only serve to give the officer an erroneous idea of the object of his calling. Surely, though his intentions be well enough, he cannot close his ears to public opinion.

The rule that counsel who has once taken part in litigation, and been entrusted with the secrets of one party, will not be allowed to engage himself for an opposite party, notwithstanding the original agency has ceased, has been extended to criminal law. In Georgia, the solicitor-general was not allowed to assist in the defence of a criminal, even after his office had expired, and he was no longer connected with the prosecution, because he had, during his tenure of office, preferred a bill of indictment against the prisoner and prosecuted it.

In Indiana, also, the Court held it improper to allow an attorney to assist in the prosecution of a case who had previously been employed by the defendant to make his defence; for the reason that such a course would defeat the very purpose for which courts were organized.

V. Duty on the Trial.—The first consideration which should operate to warn the counsel for the people on the trial, should be not to throw too much feeling in the prosecution. There should be no anxiety on his part to obtain a conviction. One who throws emotion in the trial awakens a sentiment in favour of the accused, rather than secures a conviction. "Neither the shocking nature of the crime, nor the heinous character of the accused, nor the exalted rank of the accuser, nor any other circumstance, should disturb the mind or temper of the advocate. Whoever the accused may be, and whoever the accuser, and whatsoever the nature of the charge, there should appear but one unswerving desire on the part of the advocate, namely, to lay the facts of the case before the tribunal who is to judge of them." Neither can it be of any advantage to a prosecuting attorney to obtain a conviction by fraud or artifice, contrary to the real merits and justice of the case. It is the duty of the prosecuting officer to treat the prisoner with judicial fairness, and to inflict punishment at the expense of justice is no part of the purpose for which he is chosen. Unfor-

tunately it is, however, that we sometimes hear of cases in which the prosecuting officer assumes it his duty to act as the counsel of the complaining party, instead of the representative of the public in the administration of justice.

Seldom cases occur like the one in Tennessee, in which the Supreme Court set aside a verdict in a criminal case, because by the artifice of the prosecuting officer the prisoner was induced to go to trial under the supposition that certain witnesses for the State were absent, when, as a matter of fact, they were present, and kept in concealment by that functionary. Whether the prosecuting officer on the trial treat the accused with the same fairness when he appears by counsel, and when he does not, is a matter quite unsettled. In localities where the practice is for the Court to appoint counsel for indigent prisoners, the question is not so likely to arise. Mr. Bishop thinks "the orderly course of business in the tribunals and the ends of justice are, in most instances, alike promoted by leaving it equally to the counsel of the prisoner and of the people, to present each the cause of his client in the clearest light. But when the prisoner has no counsel, or when the counsel makes some great slip in the management of his cause, the counsel for the people should not press an advantage to obtain an improper conviction." Undoubtedly this is the true rule, and one that could be followed with safety. But in an English case for murder, when the prisoner was defended by counsel, the rule was extended much farther. "In opening the case," says the report, "Corbett, for the prosecution, said that he should state to the jury the whole of what appeared on the depositions to be the facts of the case, as well those which made in favour of the prisoner as those which made against her, as he apprehended his duty as counsel for the prosecution to be to examine the witnesses who would detail the facts to the jury after having narrated the circumstances in such way as to make the evidence, when given, intelligible to the jury; not considering himself counsel for any particular side or party. He then opened the whole of the facts," etc. Gurney, B., who presided at the trial, said: "The learned counsel for the prosecution has most accurately conceived his duty, which is to be assistant to the Court in the furtherance of justice, and not to act as counsel for any particular person or party."

The rule that we have stated would apply to the facts, may be applied equally well to the law, namely, that the argument should be fair and impartial. There is a reported case, in which, on appeal, no counsel appeared for the prisoner, and whose cause was argued by an *amicus curiæ*. Then, says the report, the attorney-general told the Court that he had thought it his duty to consider carefully and impartially the question presented by the bill of exceptions; and he thought it his duty also to say that he was clearly of the opinion that the judgment of the Circuit Court on

that point was erroneous. So, also, in a South Carolina case, the Court remark: "The attorney-general, entertaining doubt as to the correctness of these convictions, if supported by the Act of 1869 alone, has, with a candour highly creditable to him as a public officer, signified the same to the Court, thereby strengthening the judicious arguments of the counsel for the defendants in support of this objection." Although this may be the law, the counsel for the people may in some cases find it consistent with his duty to argue in support of that interpretation of the law that will sustain the theory of the prosecution, regardless of how his own private judgment may be. In *Hurd v. The People*, the Court say: "The only legitimate object of the prosecution is to show the whole transaction as it was, whether its tendency be to establish guilt or innocence. The prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent. His object, like that of the Court, should be simply justice; and he has no right to sacrifice this to any pride of professional success. And, however strong may be his belief of the prisoner's guilt, he must remember, that though unfair means may happen to result in doing justice to the prisoner in that particular case, yet justice so attained is unjust and dangerous to the whole community."

Prosecutions may be carried on without the aid of the prosecuting officer. Under one system of practice, it is impossible for him to be present at the trial of all offenders, and if the validity of a judgment of guilty depended upon the presence of this officer at the trial, doubtless many criminals would escape. The fact that a prosecution was carried on without the aid of a prosecuting officer, by one who acted under authority of the Court, has been held not material after verdict, and the party convicted can take no advantage of it.

VI. *Assistance*.—A prosecuting officer may, with the consent of the Court, have the assistance of other legal persons in the conduct of the case. But while this may be so, the counsel thus assisting must exercise no control. In regard to the whole matter of appointing assistant counsel, Dewey, J., observes: "When this takes place, it must be at the request of the district attorney, and under some stringent reason arising in the case."

It is scarcely probable such assistance would be refused in any case where there was urgent need of it. Declining to do so might place the case of the people at a disadvantage, especially when the counsel for the people is young and inexperienced, and that of the prisoner possessed of great ability and perhaps numerous.

No Court would allow a prosecuting officer to receive compensation for the services he is bound to perform, from persons interested in the conviction of the accused, even though there be no express prohibition. Neither will an assistant employed and paid by persons interested in the prosecution be generally allowed to aid at the trial. Not that such employment is unlawful, but that

it is not safe to entrust the administration of criminal justice to those who will be tempted to use it for private ends. The office is one of trust, that no one will be expected to abuse when he has once been charged with its duties: consciousness of the impartiality he should always maintain in all that he does pertaining to the office, should always be uppermost in his mind.

The means adopted by a lawyer to acquit his client, no matter how unprofessional they may be, can never serve as any criterion to the prosecuting officer. Nor is it always safe for the former to obtain a conviction in the same manner that the latter obtains an acquittal. Neither should the prosecuting attorney exert the same amount of zeal in the conviction of a prisoner that the counsel for the defendant should in his acquittal, for their duties are different. It would not generally be said that a lawyer engaged in a cause would be justified in abandoning all effort, if it appeared that the prisoner were guilty. Common sense would dictate that such a course would be disastrous to the whole recognised system of justice. The one is employed to clear the defendant, if it lies in his power; the other to convict only when the evidence and justice demand it; and in no instance is the latter to act as the paid attorney of one side, when his sole duty is to act for the people impartially. Even though our plan of criminal jurisprudence is the best that can be devised, there may be some slight opportunity for improvement in the direction of the selection of officers to fill this position.—*American Law Review*.

Reviews.

The Lord Advocates of Scotland from the Close of the Fifteenth Century to the Passing of the Reform Bill. By GEORGE W. T. OMOND, Advocate, Edinburgh. David Douglas. 1883.

MR. OMOND has produced two very readable and instructive volumes upon a subject which ought to excite general interest throughout Scotland. They really contain a history of the country during a period of more than two centuries. The Lord Advocate has always been a public man, and since the Union almost the only public man Scotland could boast of. He has often been an eminent man, and even when not so he has been associated with great events. He has had charge of all the legislative measures of importance affecting the country—he has figured with more or less renown in all the political contests. With every matter of importance, from the suppression of a rebellion to the prosecution of a Nonconformist, his name has been connected. Mr. Omond has, moreover, brought down Scottish history to recent times. That history did not, as some historians would almost lead us to suppose, terminate at 1745. Scotland's struggles were not altogether ended upon Cul-

loden field. The annals of Scotland during the following eighty years present a most interesting study. Throughout that period the Lord Advocate has been the central figure.

This work has been published at a time when special attention has been called to the office of Lord Advocate, and from different motives men have been led to inquire into its past history. Some jealousy has been manifested, chiefly, it may be remarked, by Englishmen, lest it should be shorn in these utilitarian days of its ancient glory and dignity. The origin of the Lord Advocateship, the changes which in past times have affected it, and the manner in which it came to be what it presently is, are all subjects upon which Mr. Omond has supplied information in a popular form. When the Local Government Bill is again under consideration of the House, we recommend members to avail themselves of the facts which he has laid before his readers, and verified by numerous weighty authorities. His book reveals, what, indeed, one might have almost inferred from a general knowledge of Scottish history, that the Lord Advocate has been brought into his present position out of one which the title itself sufficiently describes by the sheer force of circumstances.

That the Lord or King's Advocate should not only conduct Crown prosecutions and civil causes, but should at the same time be concerned in all legislative work connected with this country, and administer nearly all the Crown patronage, may at first sight seem strange. But the explanation is very simple. For nearly two centuries Scotland has been governed from London—that is to say, by a Government which knows nothing about our laws or our religion. The one Scotsman who was always in his place in Parliament, who in virtue of his profession was acquainted with our laws, and who knew, or was supposed to know, what the nation wanted, was the Lord Advocate. Hence, while nominally the Home Office administers the affairs of Scotland, in reality the Lord Advocate has had committed to him the power of a Secretary of State. Had matters continued as they were at the Revolution, had the Scottish Privy Council and Secretary been retained, the duties of the Advocate must necessarily have been restricted as they were in former days.

Mr. Omond has prepared a chronological table of the Lord Advocates, the notes to which contain really an abridged history of the office. At the institution of the Court of Session in 1532, the King's Advocate was made one of the judges. A few years afterwards he was named as one of the officers of State. Not until 1587 was he recognised as public prosecutor. Ten years later, Sir Thomas Hamilton got the appointment as sole Advocate ostensibly in the interests of the public. Until beyond the middle of the 17th century, the Lord Advocate continued in some mysterious way to combine judicial functions with those of a counsel for the Crown. This fact alone would serve to show how different was his office

from that now held under the same title. After the Union a Secretary of State for Scotland was appointed, and the Privy Council abolished. The Secretary continued, if we except an interval of a few years, until the rebellion of 1746. His office was then finally done away with. In 1775, Lord Advocate Dundas, who had the advantage of being a great personal friend of the Premier, obtained the entire patronage of Scotland. His successors have doubtless reaped the benefit of the position which Dundas secured for his office, and ever since his time the Lord Advocates have retained a degree of power, varying, doubtless, with the individual capacity of the men, but always considerable. At the same time they have had no title to be Crown legal advisers and public prosecutors, and when a Lord Advocate has been weak or bashful, and a Home Secretary strong and self-asserting, the former has gone to the wall, and been confined strictly within his province. There appears, however, to be a distinction between the Lord Advocate and the Attorney-General in England which is right to bear in mind. As we have seen, the Lord Advocate became an officer of State, and these officers were, as Mr. Omond points out, "the constitutional advisers of the Crown on all political matters." Lord Meadowbank, in an opinion quoted by Mr. Omond, says: "From remote antiquity the Advocate was *virtute officii* a confidential and responsible adviser of the sovereign. In that respect the office was entirely different from that of the Attorney-General in England, who always has been only a law officer of the Crown, and whose advice, before it can be followed by the king (and for which no responsibility ever attaches to the Attorney-General himself), must be adopted and acted upon by His Majesty's confidential servants, who himself is responsible to the sovereign." But it is obvious that while prior to the Union the Lord Advocate was only one of several officers of State who formed, as it were, the Scottish Cabinet, after that event and the abolition of the Scotch Secretaryship he became the only officer of State who was in constant communication with Government. In the early part of the last century the affairs of Scotland attracted greater attention in England than they have ever done since. It was in Scotland that the strength of the Jacobites lay, through Scotland that they hoped to strike the blow at the house of Hanover. Scotland was a disturbed and discontented country, and therefore dangerous. The Lord Advocate could hardly at that time have been entrusted with the management of the nation. But after 1746, when all danger had passed away, it was a convenient and easy plan to hand over to this official the charge of his fellow-countrymen. The Scottish Secretary was dispensed with, and the Advocate reigned supreme. The government of Scotland must at that time have been a work of very much less magnitude than at present. Hardly any of the numerous boards and offices, which it was recently proposed should be handed over to a special administration, then existed. There was

no Board of Supervision, or of Lunacy, no system of registration, no census to take, no constituencies in the modern sense of the word to agitate their grievances. A few acts of sedition, magnified into treason, alone attracted public attention towards Scotland, and with such the Lord Advocate was well qualified to deal. In 1804, Lord Advocate Hope maintained that the whole of the executive government of Scotland was under his particular care.

The first King's Advocate of whom Mr. Omond makes mention is Sir John Ross of Montgrenan, an Ayrshire knight, who appeared in certain treason proceedings against the Duke of Albany in 1483. The earliest traces of the office in the public records are to be found about this date. The original public prosecutors would seem to have been the Sheriffs and the Justices-Clerk. The statutes of 1424 and 1436 direct prosecutions to be undertaken by them. The King's Advocate was doubtless at first the representative of the sovereign in cases which particularly concerned him, just as railway companies and other bodies have standing counsel. Mr. Omond's suggestion, that this officer may have been intended to take the place of the French Procureur du Roi, is, looking to the close connection then subsisting between France and Scotland, extremely probable. In early days the office of King's Advocate seems to have been held by more than one counsel at the same time. Thus in 1503 James Henderson of Fordell and Richard Lawson of Hariggs acted jointly, and such a custom was common during the 16th century. As the position became more clearly defined, and the duties more important, the system of selecting one man for the post, with power to appoint deputies, prevailed.

The most famous of the Advocates during the 16th century was Sir John Skene, the legal adviser of the youthful James VI. His name is honourably connected with honest work—with the earliest of our law books, commissions for the digest and reform of our laws. He accompanied Melville in his embassy to Denmark. He is associated with no scandal, although, as Mr. Omond tells us, "the Court of Session was at this time the scene of shameless bribery and corruption. The Justice Court and the Council Chamber were, on the other hand, the scene of the most horrible cruelties." We trust that it was to his colleague Skene left the odious duty of prosecuting witches, and of gratifying the loathsome taste for cruel tortures which his royal master had developed. In the earlier part of the 17th century, amongst the eminent lawyers who filled the office were the founders of the noble Scottish houses—Hamilton and Hope. The believers in the hereditary nature of talent will find the history of Scottish law rich in facts which support their theory. Hamilton was the son of a judge. The family of Hope has again and again contributed illustrious men to the legal profession. Thomas Hamilton, or Tam o' the Cowgate, as he was called, was born in 1563, and having become a lawyer in 1587, was raised to the bench, at the early age of twenty-nine, in 1592.

Had he lived in modern times, his career as a public man would have then probably ended. But in those days the bench seems to have been no shelf. Having been appointed joint-Advocate with David Macgill in 1596, upon the death of the latter he became the sole possessor of the office. Doubtless the ambition of Hamilton brought this about; but the reason given in the royal letter appointing him is "in respect that the said office may be better handled and with less cost to the subjects, when one qualified, discreet, and diligent man gives himself wholly thereto, and bears the full charge in his own person, than when the charge referred to is committed to two or more." Like Dundas in more modern times, Hamilton devoted himself to politics. With the clergy of the Presbyterian Church, who were then bold and powerful, the nation being in reality, and the king nominally with them, Hamilton was unpopular, and suspected of having dregs of a "stinking Roman profession" about him. The controversy which he carried on with the ministers resembled in its nature that which led to the secession of 1843. The Church refused to recognise the authority of the Crown when interposed to prevent the holding of a General Assembly. Matters were, however, carried with a higher hand in the 17th than in the 19th century, and a declinature of the jurisdiction of the Privy Council on the part of the ministers was indicted as treason. "The Lord Advocate," we are told, "conducted the prosecution with a total disregard of fairness." Mr. Omond's authority is a letter from Hamilton himself to the king, in which he admits that had not the jury been packed an acquittal would have followed. The defence of the accused on this occasion added greatly to the reputation of a certain young advocate called Thomas Hope, who went to Linlithgow to attend the trial along with three of his legal brethren. So formidable was the undertaking, however, that the hearts of the number failed them when the time came, and upon Hope devolved all the hard fighting. "His pleading that day," a contemporary assures us, "procured him great estimation and manie clients."

Under Hamilton may be said to have commenced that weary warfare between Church and State which lasted, if we except the period of the Commonwealth, down to the date of the Revolution. But if unpopular with the mass of his fellow-countrymen, his success as a courtier was great. He exchanged the office of Lord Advocate for that of Clerk Register; he then became Secretary of State, and finally President of the Court of Session, after having been raised to the peerage. He sat as commissioner at the Perth Assembly in 1616, so celebrated in Scottish ecclesiastical history,—a black Assembly in the opinion of all true blues, at which the Five Articles of Perth were passed, and Prelacy had a shortlived triumph. In that triumph Hamilton shared, and obtained the earldom of Haddington, now held by his descendant. "The records of his wonderful industry as a lawyer," says Mr. Omond, "still remain,

covered with dust, among the manuscripts of the Advocates' Library in Edinburgh. As a politician he displayed the same untiring energy. He was for many years Prime Minister of Scotland. In all the dangerous measures which James undertook he found a willing servant in Lord Haddington. But while he did not hesitate to use any means, however harsh, in order to secure the royal supremacy, it must not be forgotten that in his time, and by his talents, public order was maintained in Scotland as it never was before." Hamilton was the first of the Advocates who really rose to a position of greatness.

Hope, it has been seen, started life upon the popular side; he was the adviser and defender of the Presbyterian clergy in their acts of rebellion against King and Council, and was not afraid to cross swords with the Advocate himself on behalf of his reverend clients. Nor did he ever actually forsake their cause to the end, as he seems to have been trusted by the Presbyterians and looked upon as their friend at Court. His success as a politician was not due to mere skill as a time-server, but in the first place to his really great abilities as a lawyer, and in the second to the peculiar position in which the Crown was placed. Government stood in need of the best legal advice, and Hope was the man to supply it. Moreover, his Presbyterianism, which in the previous reign might have proved fatal to his advancement, was not without its advantages in the days of Charles the First. The Presbyterians had become stronger and the king weaker as time went on; it became necessary to conciliate them, seeing that they were not to be easily extinguished. Hope was therefore enabled to obtain a high position for himself without betraying his clients. On the contrary, as the saint in Cæsar's household, he was doubtless able to benefit them. He was as creditable a specimen of the Lord Advocate as these evil times produced, and Mr. Omond has been able to sketch his career to the end without having to point out anything which might be really called a blot upon his character.

The times indeed were evil, and became more so as the century advanced. Between the Restoration and the Revolution it were almost vain to look for a public man in Scotland whose hands were clean, and certainly no Lord Advocate could have passed a satisfactory inspection. Concerning the lawyers of the Restoration Mr. Omond says, "No genial humorist, like Cockburn, could take pleasure in dwelling on their sayings and doings. Lawyers and politicians, they are all alike—cruel, avaricious ruffians. They are continually drunk, both at the Council table and at home, etc. The Council Chamber reeks like a charnel-house. The air is tainted with the smell of blood." The description is severe—perhaps too severe. We must never forget that much of our information regarding these times is received from extremely prejudiced and credulous men,—men who were ready to believe any scandal relating to the Court party, and magnifying

it in the circulation;—men who could see no merit in such a prelate as Leighton, simply because he was a prelate. With such tainted sources, we must be cautious in pronouncing an opinion even upon the government of Lauderdale. Whether drunk or sober, the politicians of that day did some good legislative work. But after making every allowance, both for the men themselves and for the prejudices of their critics, it is impossible to vindicate the administration of Scots affairs. There are plain facts no one can get over. The people were extremely loyal in 1660. By sheer ill-usage, and nothing else, the majority of them were led in 1688 to welcome a revolution which drove the Stuarts from the throne. Measure after measure had been passed wounding the national conscience, bringing some men to the gallows, banishing others, burdening with fines and penalties a vast number. Petty insurrections, magnified (as has always been the way with tyrannical Governments) into rebellion, formed an excuse for placing rich districts of Scotland under martial law, and handing the inhabitants over to the tender mercies of dragoons and curates. Nothing can excuse such a policy. But when we turn from the Government to the governed, we are again disgusted with the ignorance, the bigotry, the pig-headed obstinacy which stood in the way of all compromises.

The Lord Advocate of the day had no very enviable position. Even Claverhouse despatched his victims quickly, and was after all but a rude soldier, for whom some excuse might fairly be made. But the Advocate brought his skill and learning to bear amidst the horrors of the torture-room; he caught juries with his web of sophistry, or coerced them into a conviction, and the ghastly gallows usually wound up the protracted proceedings which he had instituted. In the opinion of the people, "bloody" was a fitting epithet to apply to him; and the refined cruelties of a Mackenzie made probably a deeper impression upon the public mind than did the coarse brutality of a Dalziel or Dundee. It would have been difficult for an upright and humane man to preserve clean hands amidst the work which he was called upon to perform. But upright and humane men were rarely to be found in the service of Charles II. Two Lord Advocates in succession, Fletcher and Nisbet, were forced to resign because of charges brought against them—charges which even the Privy Council could not overlook. Sir George Mackenzie (Nisbet's successor) is a curious type of the period—an interesting but melancholy study. For from him, accomplished and talented, a philosopher as well as a lawyer, better things might have been expected, and perhaps in happier times Mackenzie might have lived and died highly esteemed. As it was, his very name has by successive generations been cursed, and his writings only serve to show how sadly a man's practice may differ from his theories. "There was the Bluidy Advocate Mackenzie," says Wandering Willie, "who for his worldly wit and wisdom had been to the rest as a god." It was Mackenzie who

wrote concerning the office of an advocate, "What is so desirable as to be a sanctuary to such as are afflicted, to pull the innocent from the claws of his accuser, to gain bread for the hungry, and to bring the guilty to a scaffold?" But this was not the nature of the work in which as Crown prosecutor he was called upon to engage. While in opposition he did indeed more than once defend the victims of oppression, but he was just as ready to exert his talents upon the other side, and, as accuser, oppress and bring to the gallows men who had done no wrong. "Mackenzie," says Mr. Omond, "claims to have commenced his term of office by persuading the Privy Council to sanction certain rules which he had framed to prevent 'all the fanatics' just exceptions against the forms formerly used against them.'" His name is associated with the detestable trial of Mitchell, a man who possibly was guilty, but whose condemnation was brought about by the shameless perjury of four privy councillors. He was Advocate during the peculiarly evil days which followed the murder of Sharpe, and by his numerous prosecutions earned his popular reputation. "In many cases," remarks Mr. Omond, "Claverhouse would have been powerless without Mackenzie. Claverhouse caught Presbyterians in the field; Mackenzie convicted them in the Court. Endless stories are told of the Lord Advocate's conduct before the Privy Council and the High Court of Justiciary. Torture was a customary and effectual mode of examination. Men were carried screaming and struggling into the Council Chamber to be questioned by the author of the *Religious Stoic*."

It is singular, and perhaps to his credit, that Mackenzie was on one occasion to be found opposed to an object desired by the king. Like the seven bishops, he resisted King James when that monarch sought to relax the penal laws in the interest of his co-religionists, and this resistance led to a temporary loss of office, when he was succeeded by Sir John Dalrymple. The Revolution which followed shortly afterwards for ever closed the public career of Mackenzie, and he spent his last days in England cultivating the learned society of Oxford, and writing a vindication of that Government in which he had played so prominent a part. Lawyers will remember him as the author of the Entail Act, and the members of his own branch of the profession as the founder of the famous Advocates' Library. The man was a strange medley; one who could advocate toleration and expatiate upon the advantages of solitude, and yet one who freely devoted his time and talents to the service of an infamous Government, and in the exercise of his profession made use of torture and perjury in order to gratify the cruelty and malice of his masters.

It is with a feeling of relief that one turns from the period of the Restoration to that of the Revolution. We seem to breathe a purer atmosphere. The nation made a fresh start, and from this time forward progress, slow it may be, but still progress can be observed.

A constitutional Government developed a different class of Lord Advocates. The Fletchers, Nisbets, and Mackenzies came not again to trouble the land. The Union was followed by the abolition of the Scottish Privy Council, which had been responsible for so much of the evil in past days. The Lord Advocate had no longer his local colleagues. The importance of his office increased doubtless, and at the same time his work,—not a little time must have been consumed in the tedious journeys to and from London. He had to find a seat in an English Parliament, and expound Scottish matters to English ears. But Scottish affairs could be no longer managed quietly in a dark recess of the Parliament House; Government measures were exposed to the criticism of a powerful opposition. Scotland unquestionably benefited by the change. It was rescued from the hands of the tyrants and bigots who had between them nearly ruined the country. Our old and barbarous treason laws were swept away. Torture was no longer a legal method of ascertaining the truth. Prisoners could now compel their accusers to bring them to the bar within a reasonable time. The trial in absence, a vile invention of the past age, was abolished. Bad deeds, it is true, were done in the name of justice and under the authority of Lord Advocates for many a long day after the Union. The prosecutions of Aikenhead and of Muir might fairly rank with the acts of Mackenzie himself. That such a creature as Braxfield should have been Justice-Clerk so lately as the end of the last century, is a strong proof of what a slow process the civilisation of Scotland has been. Nor did Braxfield stand alone; he found brethren to support him, and juries who approved of his insolence, and readily followed out his suggestions. But notwithstanding all this, the country advanced in every respect during the 18th century.

The two great Lord Advocates of that century were Duncan Forbes and Henry Dundas. Forbes was worthy to serve a better king than George II., and his own wise and moderate counsels were, we fear, but slightly appreciated. Had they been listened to, it is possible that the country might have been saved the lamentable rebellion of 1745. Dundas was perhaps the only holder of the office who may be ranked amongst British statesmen. Devoted, as some of his predecessors had been, rather to politics than to law, he had the advantage of a wider sphere in which to gratify his ambitions. But his fame was not of a lasting nature. He is now chiefly remembered as one who was proud of his country, kind to Scotsmen, even when they were Whigs, and as the friend and boon companion of William Pitt.

With Francis Jeffrey, Mr. Omond's interesting work concludes. His eminence as Lord Advocate is overshadowed by his fame as a man of letters. But in his former capacity he is associated with the most important parliamentary work recorded in these volumes, and had a share in a revolution at once great and bloodless.

Mr. Omond has had to deal largely with matters political, and while not concealing his own distinctly liberal sympathies, he has, we think, striven to be an impartial historian. Even for Henry Dundas he claims many virtues. Opinions may differ as to the merits of his style, but there is no doubt that his book is characterized by good taste and sound common sense. We are inclined to regret that it was not adorned with portraits of some at least of the men whose lives are recorded. We shall look for a second and illustrated edition.

The Nature of Positive Law. By JOHN M. LIGHTWOOD, M.A., Fellow of Trinity Hall, Cambridge, and of Lincoln's Inn, Barrister-at-Law. London: Macmillan and Co. 1883.

THE English school of jurisprudence, though still basing its conclusions on the dogmatic analysis of Austin, has of late years exhibited a tendency to doubt the absolute validity of its foundation, and to seek material for its scientific inductions in a wider sphere than the insular and exclusive field occupied by its founder. Modern research into the social and political life of the ancient world has revealed legal conditions of which Austin's analysis takes no account; and rigid as it is, it cannot be expanded so as to cover them. Accordingly, the later English jurists, pioneered into this field by Sir Henry Maine, have supplemented the analytical by the historical method of study; and while they still seek a scientific explanation of such exceptions as right, duty, and law in the philosophy of Bentham and Mill, they at the same time endeavour to explain these conceptions by a historical account of the genesis and development of the institutions in which they are involved. The work before us is a new illustration of the tendency to maintain that only an approximate, and by no means a final, solution of the problems of jurisprudence can be found in Austin's idea, that law must for scientific purposes be looked at as essentially the command of a sovereign.

Mr. Lightwood's work opens with a consideration of the scientific aspect of jurisprudence, which, according to him, has two phases. "The science of law," he says, "exists for the following purposes: (1) to acquire knowledge of it; (2) to effect improvements on it." The historical growth of law is sketched, and the necessity for a science of law which will discover principles and distinctions in accordance with nature is demonstrated. The scope and function of the science of law are then explained, and clearly distinguished from the purely physical sciences on the one hand, and from the popular ideas of law on the other. This latter distinction is of especial value, for the popular ideas find expression in the same terminology as do the scientific conceptions of jurisprudence, and thus the general reader, readily forgetting that *cucullus non facit*

monachum, would be apt, were it not for such explanations as this, to give to the rhetoric of demagogues the authority which its dressing seems to command. Having thus determined his province, Mr. Lightwood proceeds by the historical method and traces society from its theoretical unit, the patriarchal family, through the more and more complex forms of the house community, the joint family, and the village community, the legal aspect of which exhibits two important features—the origin of customary law, and that of the sense of duty in the individual. Thus far Mr. Lightwood pursues his investigations in what has been called the embryology of law. He now turns to the history of Roman law in order, as he puts it, “to look for the origin of the sense of right, for the introduction of legal sanctions, and for law in its two forms of scientific and of statute law.” This portion of the work reveals in its author an easy familiarity with the method and doctrine of the civilians, and a certain felicity of illustration nowhere better exemplified than in his account of the expansion of the strict rule of possession, which comes to an end on page 241. After the primary legal conceptions have been traced to a fuller development through the Roman law, the author passes by a rather sudden transition to the consideration of modern theories of law, and gives an account of the modern English and German schools of jurisprudence. The work concludes with a couple of chapters, “Law and Morality,” and “the Sources of Law,” both of which treat their subjects from the standpoint of English utilitarianism.

This brief sketch may serve to give some idea of Mr. Lightwood's contribution to scientific jurisprudence, and will show that his work should prove acceptable not only to English students, but to all who wish to have in a convenient and readable form a critical *résumé* of the doctrines of the historical and analytical schools of jurisprudence; for Mr. Lightwood has condensed into a not too lengthy volume the results of a wide and varied study in the jurisprudence of modern England and Germany. Von Thering of Vienna exerts the strongest of the foreign influences which are to be traced in Mr. Lightwood's pages, while Austin and Sir Henry Maine are the native authorities most frequently referred to. In his preface Mr. Lightwood modestly disavows all claim to originality in the views which he maintains; but in legal works originality is perhaps of much less value than logical sequence of thought, adequate selection of material, and clearness in expression. These qualities are amply illustrated in Mr. Lightwood's book; nor, indeed, does he merely reproduce the views with which his study has imbued him. He is not slow to criticize and amplify when he cannot accept his authorities as sufficient; and, though the doctrines of jurisprudence laid down by him are of a kind which, however popular in England, has gained little vogue on the hither side of the Border, the philosophical jurists of the Scottish school would respect, if they could not share, his views;

for, as he himself remarks in a fine catholic spirit, "Hardly any idea of law is likely to be accepted by all students ; it is sufficient if each aspect is from time to time brought prominently forward, and so made to influence actual conduct. In the complication of human affairs it is enough for us to give every view proper expression and representation ; the blending of them is effected, and the final result worked into the history of the race, by forces which are beyond human control."

Obituary.

ROBERT BLAIR MACONOCHIE, Esq.—Robert Blair Maconochie, Esq., W.S., was the second son of the second Lord Meadowbank. He had attained his sixty-ninth year when he died, after a few days' illness, at his beautiful residence of Gattonside, near Melrose, on 4th October last. Mr. Maconochie having been educated at an English school and the University of Edinburgh, and served his apprenticeship in the office of Mr. Monypenny, W.S., passed as a Writer to the Signet in 1837, the same year in which the late Mr. Brown Innes passed. Nine members of the Society who passed in that year still survive. Shortly after passing, Mr. Maconochie became the partner in business of the late Allan Menzies, W.S., Professor of Conveyancing in the University of Edinburgh, and very rapidly the business capacity and rapidity of action of the one, conjoined to the profundity of legal knowledge of the other, drew a large number of influential clients to the firm thus constituted, which was soon recognised as one of the best legal offices in town. From it have issued many men who now adorn some of the higher walks in the profession, such as the present Solicitor-General Asher (at all times a favourite pupil of both his masters) and Professor Robertson of Glasgow. It may also be stated that Mr. Archibald Forbes, the talented special newspaper correspondent, was an apprentice of Mr. Maconochie. Mr. Maconochie held various public appointments, among which may be mentioned the clerkship of Lieutenancy of Midlothian and the office of clerk and treasurer to the trustees of the Dick Bequest. The latter he succeeded to in 1856 on the death of his partner Professor Menzies, whose connection with and labours in putting the administration of this bequest upon a satisfactory footing are a matter of history in the counties of Aberdeen, Banff, and Moray, whose schoolmasters profit from its benefits. Mr. Maconochie was a director of the North British and Mercantile Insurance Company. In politics he was a Conservative, and his party ever found in him a faithful friend. He is survived by a widow, three sons, and one daughter. His youngest son, Mr. Charles Maconochie, is a member of the Faculty of Advocates. Mr. Maconochie, junior partner, and

also his nephew, Mr. A. M. Hare, W.S., having died a few years ago, Mr. David Duncan is now the sole surviving member of the firm of Maconochie, Duncan, & Hare, W.S.

The Month.

Retirement of Sheriff Barclay.—We regret to hear that the well-known and respected Sheriff-Substitute of Perthshire has found it necessary, in view of his advanced age, to send in his resignation. We feel sure that Dr. Barclay carries with him the best wishes of his many friends, and we hope he may be long spared to enjoy a well-earned repose from arduous work. It is no secret that Dr. Barclay has for many years been a valued contributor to this journal, and we trust that he will still be able to communicate with our readers through its pages from time to time. In announcing his retirement Sheriff Barclay wrote the following letter to Mr. Alexander Graham, solicitor, Crieff, President of the Society of Solicitors, Perth :—

“ COURT-HOUSE, PERTH.

“ ALEXANDER GRAHAM, Esquire, President of the Society
of Solicitors, Perth.

“ MY DEAR SIR,—It would be strange were I, who for upwards of half a century presided in the Sheriff Court of Perth, with which your body is connected, should cease our happy connection without my expressing a few sentences of *farewell*.

“ I have had the great privilege to co-operate with ten principal Sheriffs since my appointment in 1829, all of whom were distinguished for great legal abilities. One only of their number died whilst in office, in despite of the ancient saying that ‘ no Sheriff of Perthshire ever died in office.’

“ In evidence of the eminence of the *ten* Sheriffs, *seven* of them were appointed judges of the Courts of Session and Justiciary, one of whom was subsequently called to the House of Lords, and another was at once made a Peer of the Realm.

“ The first *four* years of my official life—1829–1833—were very happily and profitably spent in *Dunblane*. Since my removal thence to Perth in 1833 the judicial chair of the western district of Perthshire has been filled successively by *four* Sheriff-Substitutes ; one of them was removed to the like office in Dumfriesshire and another to Inverness-shire.

“ Of the *eight* or *ten* members of the Bar whom I left at Dunblane only *one* now survives. Of about *fifty* practitioners whom I found on my removal to Perth in 1833 only two have their names on the Court Roll, but both have ceased to practise.

“ The *fourth* Sheriff-Clerk since my first appointment is now in

office, and the *third* Procurator-Fiscal now conducts the criminal business.

"It is with much pleasure that I record that the utmost harmony has ever existed between myself and the Clerks and the Fiscals during my incumbency.

"I have made 49 estimates of the value of each successive grain crop of Perthshire (technically called striking the fiars), commencing in February 1834. I have taken considerable trouble in this, and made improvements in the mode of correct ascertainment of the prices.

"I have found 16 Lord Advocates in office, and four of these were Sheriffs in Perthshire since my first appointment.

"I have known 14 successive Lord Provosts of Perth, and it is gratifying to say that the most perfect harmony and co-operation have existed (as they ought ever to exist) between all the officials of the municipality and the authorities of the county.

"Since 1838 there have been attached to the Perth Court 22 Small Debt Circuits, and which have afforded me the pleasure of cultivating friendship in remote districts of the county.

"I have lived during the reign of four Sovereigns, and had the honour, on 14th June 1837, of proclaiming at the Cross of Perth the ascension of Her Most Gracious Majesty Queen Victoria, since which time I have been rarely absent while she passed through Perth to and from her Highland home.

"I have taken part in six decennia Government enumerations of the people, the first being in 1831.

"I have taken part in 20 county Parliamentary elections, and in 17 for the burgh of Perth. In the year 1874, because of sickness of the principal Sheriff (Mr Tait), both elections fell to me as returning officer. These elections were keenly contested, but pleasantly carried through and concluded.

"Although it may appear somewhat foreign to my subject, I may mention that all the ministers of religion whom I found in office at the date of my appointment are now dead, and I have known their pulpits more than once filled with their successors. With all these gentlemen, without distinction of creed or sect, I have had much and pleasant intercourse, and obtained from them considerable assistance in cases of destitution, neglected children, and domestic discord.

"It now only remains for me to tender my thanks for the great and uniform kindness shown to me by every member of the bar, and thus testify to their professional ability, probity, and urbanity, and to wish them every blessing.

"I desire to present to your Society the engraved portraits of the ten Sheriffs (*Decemviri*), that if it be their pleasure they may decorate their library-room with the portraits of these illustrious men.

"In my room in the County Buildings I have two engravings of portraits of Conveners of the County who were and are much and

justly respected. There is also an engraved portrait of Lord Justice-Clerk Paton (who was son and brother of two successive Sheriff-Clerks), with some minor judicial prints by the celebrated Kaye of Edinburgh. I now ask my friend Mr. Thomas to accept of these as small tokens of gratitude for his uniform great kindness and frequent valuable services rendered to me.—I am, my dear Sir, yours ever and very truly,
HUGH BARCLAY."

In connection with the above letter a numerous-attended meeting of the Society of Solicitors of Perth was held in the Society's Library, County Buildings, Perth, on 5th October. Alexander Graham, Esq., solicitor, Crieff, President of the Society, occupied the chair, and the other gentlemen present were:—The Vice-President; Messrs. J. Young, A. Wilson, A. G. Reid (Auchterarder), M. Jameson, J. W. Barty (Dunblane), J. B. Miller (Blairgowrie), R. Robertson, H. Whyte, R. Hislop (Auchterarder), G. Mackenzie, W. Cochrane Young, R. Mitchell, J. A. Robertson, D. J. Keay, M. Stewart, W. Chalmers, W. MacLeish, J. B. M'Cash, D. M. M'Kay, J. Kippen, Thomas Soutar (Crieff), and D. Keay, Secretary.

The President said that the meeting had been called to receive the farewell letter from their dear old friend, Dr. Barclay, on the occasion of his resignation of the office of Sheriff-Substitute of the county of Perth. It was necessary, in the first place, to explain the reason why the letter had been printed in the public newspapers before being laid before the Society. On Saturday last he had received three applications from the representatives of the press for permission to publish Dr. Barclay's letter, which had not then reached him. The letter, however, came in the evening, and was immediately acknowledged. He (the President) had seen Dr. Barclay on Monday as to the propriety of publishing the letter before the Society had an opportunity of seeing it, and Dr. Barclay had at once given his consent to the letter being published on Monday. Dr. Barclay had been so much the property of the public for the last half-century that the representatives of the press seemed to think they had as much right to the letter as the Society itself. These were the circumstances under which the letter had appeared, and he was quite sure the Society would exonerate him of any intentional discourtesy to the members. It was now his duty to lay the letter before the Society, and he was sure that it would be received with the great respect which such a communication, at such a time, deserved. It was impossible to part with Dr. Barclay without feelings of the deepest regret; at the same time they would rejoice to find that Dr. Barclay's friends had at length induced him to take the rest and leisure he so much needed, and had so justly earned, after a long lifetime spent in the public service. In many respects Dr. Barclay had been a very remarkable man, intellectually and physically. For the long

period of fifty-four years he had presided in the Sheriff Courts of Perthshire,—four of these years had been spent at Dunblane, and fifty in Perth. Of the ten procurators he left at Dunblane on his translation to Perth only one is now alive, and of the fifty procurators he found in Perth on his arrival there, only two survive, and these have ceased to practise. During Dr. Barclay's long term of office he acted under, and enjoyed the friendship of, some of the most distinguished men who ever adorned the Bench of the Supreme Court, and he has enjoyed the friendship of men eminent in every department of science and literature. In the legal world he forms a connecting link—and a link of no mean order—between the commencement and the close of the present century. He is a man of no mere parochial reputation, but known as a judge and a great social reformer throughout broad Scotland. He has added lustre and importance to our provincial court, which might not otherwise have been a mark of particular observation to the public. As a judge, Dr. Barclay was a man of most extensive legal knowledge, perfected by long study and vast experience. He possessed a very acute intellect, great patience, and an almost superhuman activity and industry,—qualities pre-eminently suited to make an accomplished judge. It is well known that Dr. Barclay has been one of the most eminent County Court judges in Scotland, and his decisions have stood the test of the review of the Supreme Court probably better than those of any other Sheriff-Substitute in Scotland. His extraordinary energy and industry enabled him not only to overtake his actual professional duties, but to devote a considerable portion of his life to the literature of the profession. Besides his numerous contributions to the legal journals and the press of the country, he has left us his *Digest of the Law of Scotland*, now in its fourth edition, which, although it bears the humble title of a "Manual for Justices of the Peace," contains a most excellent, handy, and useful synopsis of the law of Scotland, and much curious and out-of-the-way legal information, not to be found in the ordinary text-books of the profession. This digest will in all probability prove a more lasting monument to Dr. Barclay's memory than any monument of brass or marble. They could safely say that he had maintained the honour and integrity of the Bench,—had adorned it with his talents and legal and literary accomplishments,—and now retired, after a noble and most useful life, a just and upright judge of unsullied reputation. This fact would perhaps be the most lasting and consoling comfort he could carry with him in his retirement and old age. It was not, perhaps, within the sphere of the present remarks to notice the good Sheriff Barclay had done as a social reformer and a friend of the people. These would no doubt be justly acknowledged by the public press. With regard to Dr. Barclay's relations to the Bar, it was impossible to speak of these without emotion. Dr. Barclay had been pleased to say that the Bar had ever treated him with

respect and courtesy, but the members of the Bar could say with perfect truth that he had treated the Bar not only with kindness and courtesy, but with the indulgence and love of a father. He was quite sure that no member of the Bar ever intentionally hurt Dr. Barclay's feelings,—they loved him too much for that,—but it is just possible that in the heat of debate some words might escape not particularly pleasing to his feeling and sensitive nature, but spoken to be instantly regretted. Dr. Barclay, in his relations to the Bar, was a man of extraordinary patience; he seemed to be incapable of losing his temper, and he (the President), although he had now had the honour of practising at the local Bar for the last twenty-five years, could safely say he had never seen a frown of anger on Dr. Barclay's face. Some people had said that if Dr. Barclay had kept a "tighter rein" over the Bar, it would have saved himself much worry and annoyance, and have promoted the despatch of the business of the Court. Well, so far as the despatch of business was concerned, litigants and the public could not complain, as Dr. Barclay was capable of doing, and did, the work of any two ordinary men, and there were no arrears in his court. So far as saving himself from worry and annoyance is concerned, that was Dr. Barclay's personal concern. He was a man of a large and loving heart, with the tenderness of a woman, and it was utterly impossible for him to inflict even a momentary pain by reproof. Taking him all in all, I fear "we ne'er shall look upon his like again;" and I am sure that he will carry with him into his retirement the affection and grateful esteem of every member of the Bar who has had the privilege of practising in his court. The President said that they would observe that Dr. Barclay had presented to the Society the engravings of the portraits of ten Sheriffs under whom he had acted. He had no doubt that the Society would gratefully accept these, and place them in their Library, where they would be in some measure a memorial of Dr. Barclay himself, if that were needed. He also thought that they should ask Dr. Barclay to avail himself of the use of their Library. It was a small matter, but he thought it would be a graceful compliment. The President further stated that a draft letter of acknowledgment to Dr. Barclay had been prepared and approved of by the Committee, and he submitted the draft letter to the meeting for their consideration. The letter was unanimously approved of, and the President was requested to sign and send the same to Dr. Barclay.

The letter is in the following terms :—

"CRIEFF, 5th October 1883.

"MY DEAR DR. BARCLAY,—Your letter of 29th September last, addressed to me as President of the Society of Solicitors, was laid before the meeting of the Society held to-day, and received with the great respect which such a communication deserves.

"I am desired by the Society to express the regret of all its members for the loss the Bench and the Bar of this county will sustain by your resignation.

"In the providence of God, you have been privileged to preside in our local courts for the long period of fifty-four years—a period of office not equalled by any other judge in the kingdom. During that long term of office you have maintained the honour and integrity of the Bench, and adorned it by your legal knowledge and attainments, besides contributing in no small measure to the legal literature of Scotland.

"In the estimation of the members of this Society, who have had, perhaps, the best opportunity of forming an opinion, you now retire from the Bench with the satisfaction of having been, during your long official career, an able, just, and upright judge, of unsullied reputation, and with the love and affection of every one who has had the privilege of knowing you.

"I am also desired by the Society to thank you, in an especial manner, for the uniform kindness and courtesy you have always extended to the members of the Bar, a circumstance which has contributed so much to the harmony and good feeling,—characteristic of the Perth Court,—and it is very gratifying to the Society to find that you can reciprocate the compliment.

"The Society accepts with many thanks the engravings of the portraits of the Sheriffs which you so kindly present. They will be placed in the Library, and will serve to preserve, in some measure, the memory (if that were needed) of the kind donor.

"It is a great satisfaction to all the members of the Society that you have been spared to enjoy in the evening of life a justly-earned leisure and retirement. You will carry with you the gratitude and affection of every member of the Bar, and the consolation of having led a noble and most useful life, and having done much for the progress of humanity and the good of your fellow-men.

"The members of the Society sincerely wish you every blessing and happiness in your retirement, and will be glad if you will avail yourself of the use of their Library when so disposed.—I have the honour to be, my dear Dr. Barclay, with great respect and esteem, yours very faithfully,

"ALEX. GRAHAM,

President of the Society of Solicitors, Perth."

The County Courts and the Bankruptcy Act, 1883.—In an article under the above title our contemporary the *Law Times*, after pointing out that all County Courts in England are to have bankruptcy jurisdiction, except such as are expressly deprived of it by order of the Lord Chancellor, says: "We shall await with some interest the result of the deliberations of the County Court judges. The increase in their labours will be so considerable

that their status and remuneration ought to be carefully considered by those who know that £1500 per annum is hardly the price which ought to be paid for good lawyers." We wonder what our English friends would say if they were put on the same level with Sheriffs-Substitute in Scotland. The latter as local judges possess much more extensive jurisdiction than brethren in England, and the average amount of their salaries is, we should say, considerably less than half of £1500. Far from any effort being made to increase their wretched pittance, however, it seems to be the aim of every successive Government, whether Conservative or Liberal, to cut it down to the lowest point. As office after office falls vacant, it is abolished and the work transferred to the adjoining county, very slight additional remuneration being given to the unfortunate Substitute on whom is laid the burden of the additional work. If £1500 a year is too little to be paid for good lawyers in England, surely £700 is a miserable salary in Scotland. The wonder is that we get men to accept the duties and perform them in the generally satisfactory way in which they do. Even as we write, it is commonly rumoured that the Sheriff-Substituteships at Dunblane and Selkirk are both to be abolished. It is probably useless to look for help from any of the Scotch members of Parliament, but it is the duty of all branches of the profession to speak with no uncertain voice, and to point out that in common fairness the local judges in Scotland ought to be put in a position at least equal to that of the gentlemen holding similar offices in England. We by no means grudge the County Court judges any addition to their salaries which may be necessary, but we think the attention of the Legislature should be directed to the most inadequate provision which is made for the Sheriffs-Substitute in Scotland. Their duties are yearly becoming more onerous and responsible, but their salaries remain at a figure which we cannot but consider as ridiculously low considering the position which they occupy.

Apropos of devilling, a good enough story was circulating a short time ago amongst those who practise in the Divorce Court. A junior had been asked at the last moment to "hold" a brief for a lady who was seeking relief from the bonds of matrimony, and not having had time to more than glance at his instructions, had muttered to the Court that the facts were "as usual," and was proceeding at once to put his client into the box, when Mr. Justice Butt suavely interposed, "I don't quite know what you mean by the 'usual facts,' Mr. Blank. Will you not give us some idea of them?" Mr. Blank grew very red, murmured something about the papers having only just been put into his hands, and at last was fain to turn over the pages of his brief till he came to the record of the respondent's misdoings, which he proceeded tamely

to read out. The catalogue included adultery, desertion, cruelty of every description, and in fact every matrimonial offence proscribed by law or possible to conceive. "You can call the petitioner," at last said Mr. Justice Butt, "but if these are the 'usual facts,' all that I can say is that I am very sorry for it."—*Pump Court*.

THE *Chicago Legal Adviser* gives some excellent advice to lawyers about their dress and manners. It denounces "the present disgusting style of short coats." We concur; anything connected with a suit that is short should be disgusting to the professional mind. The *Adviser* also reprobates the "slovenly practice of putting the feet on a table or chair," and "the pernicious habit of smoking tobacco." It also prohibits the lawyer's "whistling or singing for his amusement, as if employed in a cooper shop." We did not know that coopers are peculiarly in the habit of singing at work, but it may be so; in fact, we have heard about "singing a stave."

A CURIOUS coincidence is said to have occurred in the Circuit Court at Kingston, Ga., recently. The judge, in his hurry to empanel the grand jury, selected thirteen men from the number in the court-room. The law requires a small child to draw the names from a box, and when the manner in which the jury had been empanelled was discovered, the entire panel of the grand jury was set aside and a new panel was ordered. When the names were drawn from a lot of 200, they were precisely the same as had been chosen by the judge when court first convened.

A LEGAL gentleman met a brother lawyer on Court Street one day last week, and the following conversation took place: "Well, judge, how is business?" "Dull, dull; I am living on faith and hope." "Very good, but I've got past you, for I'm living on charity."

"I UNDERSTOOD you to say that your charge for services would be light," complained the client, when his lawyer handed him a tremendous bill. "I believe I said my fee would be nominal," was the reply; "but"— "Oh, I see!" interrupted the client; "phenomenal."

Correspondence.

CAN A PARTNERSHIP BE LIQUIDATED UNDER THE CESSIO ACTS?

SIR,—The question whether a firm, either by its own application to the Court or by a petition at the instance of its creditors, can be wound up under a process of cessio has not yet been authoritatively answered. Before the passing of the Debtors (Scotland)

Act, 1880, no room for doubt existed. Till that time the petition for cessio always proceeded in the name of an individual under liability to imprisonment for debt. Since then it has been competent to creditors, and is frequently adopted by them, in the case of small traders whose obligations are not of sufficient magnitude, to bring their estates within the scope of the Bankruptcy Act of 1856. But as a large number of small trading concerns are now carried on by companies, the question continually arises, how far the machinery of the Act quoted is available for the liquidation of a firm under a creditor's diligence in cessio proceedings. The Act creates a new mode of constituting notour bankruptcy applicable to cases where by its operation imprisonment is abolished. This new mode is by a concurrence of diligence (*vide* sec. 6 of the Act) essentially personal or individual, and noways applicable to a firm. By a declaration appended to this section the modes of constituting notour bankruptcy under the Bankruptcy Statute of 1856 are still to remain in force. The difficulty which practitioners have experienced in construing the intention of the Legislature arises from the phraseology of sections 7 and 8 of the Debtors Act, and specially as to what meaning is to be attributed to the word "debtor" occurring therein. It is thought that the word "debtor" and the expression "person" all through the Cessio Acts and procedure are synonymous. The spirit and scope generally of the 1880 Act seem to favour this view, and besides there is nothing sufficiently positive to place the expressions in separate categories. On the other hand, it is urged that these two sections in their opening lines refer not only to the old and the new notour bankruptcy, but also direct reference to the meaning of the word "debtor" in the Bankruptcy Act. If this be the correct reading, then by that Act "debtor" includes a firm. The context, however, rather appears inapplicable to the case of a firm, looking to the provisions of sections 26 and 46 of the Sheriff Courts (Scotland) Act, 1876, and repugnant to the view that the draughtsman of the Act had the liquidation of a firm's affairs in contemplation. The Court of Session, in their Act of Sederunt of December last, provided certain rules for cessio procedure. But whether the Court considered that the Debtors Act contained any real grounds for the doubt adverted to above, or if, having thought so, they deemed the remedy only competent by legislative enactment, I have no means of knowing. Certain it is, that until the point is cleared up the insolvent estates of small trading partnerships will continue to be wound up as at present, under more expensive diligences than that of a cessio process, as few will care to run the risk of instituting a process the statutory authority for which is so vague.—I am, etc.,

WALTER OSWALD.

ARBRATH, October 1883.

[We shall refer to our correspondent's letter next month.—Ed. *J. of J.*]

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF CAITHNESS.

Sheriff THOMS.

Police and Improvement (Lindsay) Act, 25 & 26 Vict. c. 101, secs. 11-13
—Competent to amplify boundaries in the petition to Sheriff from those in resolution by Magistrates and Council—Also to amend by adding title of an amending Act of Parliament—Circumstances where burgh extended.
 This was a petition for extension of the boundaries of the royal burgh of Wick, under sections 11 to 13 of the Lindsay Act, so as to embrace part of the Parliamentary burgh, presented by the Magistrates and Council, who had by the necessary majority passed a resolution to that effect.

The Sheriff ordered intimation and advertisement, and appointed parties to attend on 11th October, when proof was led. An inspection of the territory in presence of the agents of parties took place on the previous day.

The Sheriff has now pronounced the following interlocutor and note :—

*“ Wick, 18th October 1883.—*The Sheriff having resumed consideration of this case, and as the results of the inquiry he has made in the case, repels the objection taken to the petition, and extends the boundaries of the royal burgh of Wick to the Parliamentary boundaries of such burgh, under the exceptions mentioned in the petition, all as prayed for, and decerns.
 GEORGE H. THOMS.

*“ Note.—*There were several technical objections taken to this petition. One was based on the fact that the Town Council's resolutions did not contain the detailed supplementary and explanatory boundaries in the prayer. As the latter were proved to be identical with those in the resolution and in the first part of the prayer of the petition, the Sheriff has not given effect to this objection.

“ Another objection taken was that the Harbour Act of 1879 was alone founded on, and not the subsequent Provisional Order of this year, which received the Royal Assent only a few days before the present application was made. As the Sheriff was of opinion, under authority of the case of Rankine v. Brown, 24th Feb. 1858, 20 D. 672, 30 Jurist 342, that this amending Act did not require to be mentioned, and even if it had that he had power, and was indeed bound, under sec. 24 of the Sheriff Court Act of 1876, to amend the petition to that extent (Crozier v. Macfarlane & Co., 15th June 1878, 5 Rettie 936), he did so before proof was entered upon.

“ On the merits, he is of opinion that the extension of the boundaries of Wick prayed for is expedient; as regards Louisburgh, this cannot be gainsaid. But the agricultural portions on the north side of the river will also benefit, as the inspection showed that water for the parks and steadings was much needed. It is not to be doubted that fens for

dwelling-houses and fishcuring premises will follow on the introduction of water and drainage.

“ On the south side of the river, feuing for dwelling-houses at high rates has already begun, and proximity to the railway station will increase it. The surplus water of the Railway Company's one-inch pipe cannot be looked upon as an adequate supply. At best, it only lasts until 1893, when the Railway Company's lease of the water expires. The Railway Company will by the additional supply which Wick can afford get water for all time, as well as for their urinals, etc., which on inspection were seen not to be well supplied.

“ Wick has now got free of debt, and the fine supply of water it has secured, and the improved drainage which must immediately follow, are circumstances which did not exist when the Sheriff considered the question in 1876. Further, there were then complications which have been avoided in the present application. G. H. T.”

Act. Miller, Paterson Smith, J. M. Sutherland, and G. M. Sutherland — *Alt.* M'Lennan, for Sutherland and Caithness Railway Co.; Leith, for Duff, Dunbar, and Others; and Hector Sutherland, for John Swanson and Others.

SHERIFF COURT (ROSS, CROMARTY, AND SUTHERLAND) AT DINGWALL.

Sheriff MACKINTOSH and Sheriff-Substitute HILL.

JOHN C. BRODIE AND SONS, COMMISSIONERS FOR SEAFORTH,
v. CAPTAIN CASH.

Landlord and tenant—Quitting dwelling-house mid-term—Damages.—
“ *Dingwall, 24th August 1883.*—The Sheriff-Substitute having heard parties' procurators on the proof and whole cause, and considered the same: Finds (1st) that the defender in the original action was tenant of Maryburgh Cottage from year to year, by tacit relocation, for fourteen years prior to Whitsunday 1881, and that it is admitted that he contracted by tacit relocation, as tenant of said cottage, for the period from Whitsunday 1881 to Whitsunday 1882, at the rent of £29, 7s. 7d.; (2nd) That in January 1881 he had complained to the pursuers of the state of the cottage, and they promised to give their attention to his representations; (3rd) That the pursuers sent no answer to the defender's representations till July 1881, when they offered to make certain repairs on the house; (4th) That the defender was not satisfied with said offer, and after some correspondence between the parties he intimated, on 8th October, that he would have to leave the house, and that he would not pay rent; (5th) That he accordingly left Maryburgh Cottage about the end of October, and obtained accommodation for his wife and family at Strathpeffer, and that he now claims from the pursuers in name of damages the whole expenses to which he has thus been put; (6th) Finds it proved that the house was not in a habitable state on account of damp, and that the repairs offered were not sufficient to make it habitable, and that therefore the defender was justified in removing from

it, and is not liable for the rent beyond the time he occupied it; but for the reason assigned in the following note repels the defender's claim of damages, therefore decerns against the defender for the proportion of rent effeiring to the period of his occupancy after Whitsunday 1881, namely: decerns against him also for £1, 1s. 9d. of damage to the house not falling under ordinary tear and wear, *quod ultra* assoilzies the defender in the original action, further assoilzies the defender in the counter action of damages: Finds the defender Cash entitled to expenses, subject to modification, allows an account thereof to be lodged in process, and remits the same to the Auditor of Court to tax and report.

“CRAWFURD HILL.

“*Note.*—The defender in the original action was tenant of Maryburgh Cottage for about fourteen years prior to Whitsunday 1881, his occupancy going from year to year by tacit relocation, and he continued to occupy it until about the end of October 1881. He states that he had on many occasions complained of the condition of the house, and it appears from No. 2 of $\frac{2}{1\frac{1}{2}}$ that on 15th November 1880 and 11th January 1881 he had written to the then commissioner on the estate, Mr. Colin Mackenzie, W.S., making such a complaint. The management of the estate was at that time, however, on the eve of being transferred from Mr. Mackenzie to the pursuers, and therefore in his letter, No. 2 of $\frac{2}{1\frac{1}{2}}$, “Mr. Mackenzie recommended Captain Cash to address himself to them on the subject of his house. Accordingly, on the 26th January 1881, he wrote to the pursuers the letter No. 1 of $\frac{1}{8}$, stating that he had been obliged to leave the house till something was done to it, and enclosing report by Dr. Bruce, No. 3 of $\frac{2}{1\frac{1}{2}}$, and by Mr. Cumming, builder, No. 4 of $\frac{2}{1\frac{1}{2}}$, and asking their immediate attention to the matter. To this the pursuers replied on 1st February, No. 5 of $\frac{2}{1\frac{1}{2}}$, saying, ‘We expect that the management of the Brahan estate will in a short time be made over to us by Mr. Colin Mackenzie. When that has been done, your representations as to the state of the house at Maryburgh, tenanted by you, will receive our attention.’

“It appears from Mr. Mill's evidence, p. 46, that the management of the Brahan estate came into the pursuers' hands towards the end of February 1881; but whatever attention they may have given to the defender's representations, the result was not communicated to him till 18th July, No. 6 of $\frac{2}{1\frac{1}{2}}$. In the meantime, trusting that a favourable answer would be made to his representations, he had entered on another year's occupancy of the cottage by tacit relocation.

“In their letter of 18th July, the pursuers offered to put ‘a new roof on the scullery, to lay with wood the portion of the floor of it at present laid with clay, and also to have the roof of the front house repaired, to stop the leak that admits water into the bedroom.’

“The defender was not satisfied with this offer, and after some correspondence between the parties he intimated on 8th October, No. 2 of $\frac{1}{8}$, that he would leave the house, and would not pay rent. He accordingly left it about the end of October. In these circumstances the pursuers now claim rent for the whole year. The defender is willing to pay for the period he occupied the house, but refuses to pay for the period after he left it.

“ It would have been well in every point of view if matters had proceeded throughout in the same business-like way in which the negotiation began, but in this respect both parties are to blame. From what was stated in the pursuers' letter of 1st February, the defender was certainly entitled to expect that they would reply to his representations about the house without delay, after the management of the estate came into their hands; but instead of doing that, they allowed about five months to elapse before they wrote him. Had they written to him at once in the terms they wrote on 18th July, he says he would never have entered on another year's occupancy, and all this litigation might have been avoided. On the other hand, it was, to say the least, imprudent of the defender to enter on a new year of the house without insisting on a definite answer as to what would be done to it. Having entered on another year, he has made himself liable for the whole year's rent, unless he can prove that he was justified in leaving it at the middle of the term. To make this out, he must show (1st) that the house was not in a habitable state; and (2nd) that what the pursuers offered to do was not sufficient to make it so.

“ Now, after considering the evidence adduced, the Sheriff-Substitute has come to the conclusion that it has been established that on account of damp the house was not in a state fit for habitation, and that there was a great risk of injury to the health of the defender and his family if they continued to reside in it during winter. The defender's own evidence is corroborated on these points by that of J. Mackenzie and Hector Maclean; by the report of C. Cumming made in December 1880, and to every statement of which he swears that he adheres; and by the reports of Drs. Bruce and Adam. On the other hand, the pursuers have produced no evidence as to the actual state of the house at the time the defender left it. Mr. Mill, who conducts the Braham estate business for the pursuers, saw it in the end of June or beginning of July 1881, and he says he saw no signs of damp except in a corner of one room. Certainly if the house was ever to be damp, it would be at that season. Mr. Maitland again saw it only in June 1883, that is, after the repairs (of a more extensive character than had been offered to the defender) had been executed for the present tenant. Whether the pursuers took any steps to ascertain if the defender's complaints were well founded, is left in doubt. Mr. Mill says, p. 47, ‘ I do not remember of anything being done by me or the firm by way of ascertaining the accuracy of the statements contained in No. 3 of $\frac{2}{12}$.’ No doubt he speaks, pp. 44 and 45, of a report having been ordered as to the state of the house, but not by him, and he cannot tell whether such a report has been made. At all events, neither Mr. Blake, the local factor, who is supposed to have ordered it, nor Mr. Binning, who is supposed to have made it, nor the report itself, if such exists, have been produced in evidence. On the whole, therefore, the Sheriff-Substitute is of opinion that the damp and consequently unhealthy state, not only of the kitchen department, but of the main house, is established. He is also satisfied that what the pursuers offered to do by their letter of 18th July 1881, as it applied almost entirely to the kitchen department, was not sufficient to put the house into a habitable state. He has accordingly held that the defender

was justified in leaving it at the time he did, and that he is not liable for rent after the time he left.

"The defender's claim of damages has been disallowed, because it seems that it was, to some extent at least, owing to his own imprudence in not insisting on a definite answer to his letter of 26th January 1881, before he entered on another year of the house, that he was obliged to leave between terms, and was put to the expense and inconvenience of which he complains. The defender has been found entitled to expenses, subject to modification, that is to say, in so far as regards any expenses specially applicable to his action of damages. C. H."

This interlocutor was appealed to the Sheriff, who practically affirmed it in the following judgment, which is an interesting one:—

"*Edinburgh, 8th October 1883.*—The Sheriff having considered the pursuers' appeal and heard parties' procurators, refuses the said appeal, and affirms the interlocutor of the Sheriff-Substitute, except in so far as it decerns against the defender for £1, 1s. 9d. of damage to the house not falling under ordinary tear and wear. To that extent recalls the said interlocutor, and decerns: Finds the defender entitled to additional expenses, and remits the account thereof to the Auditor to tax and report.

"W. MACKINTOSH

"*Note.*—The Sheriff has found this a very delicate case, and it is not without difficulty that he has reached the conclusion expressed in the above interlocutor.

"There can be no doubt that, speaking generally, a landlord is bound to provide his tenant with a habitable house, that is to say, a house habitable consistently with health and a reasonable degree of comfort. But this rule must always be subject to the qualifications that a tenant cannot complain of defects, however serious and however inconsistent with health or comfort, which are inherent in the structure of the house, and known or obvious to him when he agrees to become tenant. For example, if a man rents a cellar for purposes of habitation, it may be improper that the cellar should be let for such a purpose, but the tenant cannot complain if it proves damp and unhealthy. Similarly, if a house is built without lath and plaster, and is known to be so, the tenant cannot complain if it is highly uncomfortable. The difficulty in the present case is to distinguish between defects of this latter character and defects of the nature of *disrepair*, for which undoubtedly the landlord is liable, and as to which the tenant, even if he know of the defects, is justified in assuming that the landlord will make the necessary repairs.

"There can be no question that at the time when Captain Cash gave up his possession the house was not as it stood in a habitable condition. This indeed is not seriously disputed by the landlord, but the landlord maintains that the repairs which he offered in July 1881, and which were rejected by the tenant as insufficient, would, if executed, put the house into a condition compatible with health and comfort, or at all events into a condition as good as the structure and the situation of the house permitted. Upon this matter it cannot be said that the evidence is other than conflicting. But the ground upon which the Sheriff has proceeded shortly is, that the onus of proof is in this matter on the landlord, and

that the landlord has failed to prove to the satisfaction of the Sheriff that the repairs in question which he offered would have been sufficient to put the house into *tenantable* repair. In saying this the Sheriff has quite in view that several of the defects complained of by the tenant are defects not of repair, but of structure, with which, as above explained, the landlord was not, in the Sheriff's opinion, bound to deal.

"The Sheriff has also had in view that the tenant entered upon a new year's possession at Whitsunday 1881, in the full knowledge of the state of the house; but on this matter the Sheriff agrees with the Sheriff-Substitute, that the correspondence which passed in January and February preceding entitled the tenant to expect that the house would, as far as possible, be put into tenantable repair. The Sheriff, however, also agrees with the Sheriff-Substitute that the tenant acted on this expectation at his own hazard, and that he cannot now claim damages because the landlord disappointed expectation which he (the tenant) might, if he pleased, have brought to the test of an agreement before he renewed his tenancy.

"The Sheriff has therefore on the whole adhered to the Sheriff-Substitute's interlocutor, except in regard to the small sum allowed to the pursuer for dilapidation. The Sheriff does not think that there is sufficient evidence that these dilapidations were due to the defender's fault, and may not have occurred during the period when the house stood empty after the defender left it.

"As regards expenses, the Sheriff sees no reason to differ from the Sheriff-Substitute. W. M."

Act. Smith & Duncan—Alt. Wm. Mackenzie.

SHERIFF COURT OF PERTH.

Sheriffs MACDONALD and BARCLAY.

STEWART AND SPOUSE v. MALLOCH.

Nuisance—Use of property—Interdict.—This was a case where the proprietor and occupant of a flat in a tenement in the High Street, Perth, sought an interdict against the proprietor and occupant of the immediate upper flat using his property as a fish-hook and bird-stuffing establishment, on the allegation that the same was a nuisance, both because of the noise and the smell occasioned by the trade. After proof, the following interlocutor was pronounced:—

"*Perth, 24th January 1883.*—Having heard parties' procurators, and made avizandum with process, proofs, and debate: Finds as matters of fact,—

"*First,* That it is assumed that the female pursuer is proprietrix of the second storey or flat situated in the High Street of Perth, and that the defender is proprietor and occupant of the third storey or flat in the same tenement immediately above the pursuer's flat, and that the defender occupies said flat as a workshop in connection with his business as a fishing-tackle maker and bird-stuffer.

"*Second,* It is not proved that the defender in the use of said flat has 'shaken the building, cracked the ceiling and plaster on the walls, or injured the property.'

“*Third*, It is not proved that the defender in the use of his property has, considering the locality of the premises, done anything which is of the nature of a nuisance, so as to entitle the pursuers to obtain an interdict against his occupying the same in prosecution of his lawful trade.

“Therefore refuses the interdict and assoilzies the defender: Finds him entitled to expenses (on the usual scale); remits the account thereof, when lodged, to the Auditor of Court to tax and to report, and decerns.

“HUGH BARCLAY.

“*Note*.—At the debate it was understood that the defender repeated his offer to lease the under flat for a term of years at the present rent, and that the pursuers agreed to accept the offer. This judicious offer and acceptance would effectually settle the matter, leaving only the ugly question of expenses to be decided by the Court. It would have been judicious that such arrangement had been come to before entering the Court, as it is not likely to be now perfected after costs have been incurred and awarded.

“The pursuer’s solicitor at the debate conceded that the most serious averment as to substantial or permanent injury to the property was negatived.

“As to the question of nuisance, every proprietor or occupant is entitled to the *full* use of his own, provided he does not thereby injure his neighbours or the public. Some uses of property and trades are of their very nature very great nuisances. Others must be conducted in such a manner as to cause little or no offence, and therefore require proof of *abuse* to bring them under the category of nuisances. Again, a use of property may be held a nuisance in a densely populated locality which may not be so when in a solitude, away from the habitation of man. Even in cities a use of a property may be held a nuisance in a *crescent* and not in a *vennel*. Such may be in the erection of a school or a tavern bar.

“Persons who take their abode in a town cannot expect to have the solitude of rural life, and perhaps those who seek the country may discover they have surrendered much of social life.

“Much depends on the taste and sensitiveness of near neighbours. It may be that a bilious bachelor, accustomed to retire late to sleep and compensate himself by lying late in the mornings, might envy and complain of his upstairs neighbour, blessed with a numerous family, whose agile limbs early in the mornings beat the floor in all the joyfulness of adolescence; but never could it be held that the celibate could complain of this as an actual nuisance, however much it might and justly prove a *personal* discomfort.

“The injury to the property not being substantiated, or rather *negatived*, the question resolves into one of nuisance, and the facts proved certainly *negative* entirely the affirmative of nuisance. H. B.”

On an appeal, and after hearing parties’ procurators, adhered *simpliciter* to the judgment of his Substitute.

Act. Cash—Alt. Mitchell.

THE JOURNAL OF JURISPRUDENCE.

PRIVILEGE OF COUNSEL OR ADVOCATE AS A DEFENCE TO ACTIONS OF SLANDER.

It is clear that there must be a certain amount of protection given to persons engaged in judicial proceedings in regard to statements made by them in the course of these proceedings. Public policy demands this. If there was no such protection, if persons engaged in judicial inquiries were liable to an action for slander on account of statements made by them in this public capacity, equally as if the statements were made on a private occasion and in a private capacity, they would be hampered and embarrassed in their action, and the administration of justice would consequently suffer a serious detriment. The only question is, How far does this protection extend? Is it an absolute immunity, or is it a privilege enjoyed only so long as the statements are relevant to the matters at issue, and made *bona fide* and without malice? It has been held, in England at least, that an absolute protection is allowed to judges and to witnesses, and that no action will lie against them for any statement made by them in the course of any judicial proceeding. Is a counsel or advocate, and in this relation a solicitor pleading for a client is to be regarded as an advocate, and so entitled to whatever privilege a counsel may claim (*Mackay v. Ford*, 5 H. and N. 792),—is a counsel or advocate entitled to the same absolute immunity as a judge? If not, why not? What reasons of public policy justifying the privilege to the larger extent exist in the one case which do not exist in the other?

It has been contended that the privilege is limited in the case of an advocate,—that he cannot claim the benefit of the privilege unless he acts *bona fide*, that is, for the purpose of doing his duty as an advocate, and only so long as what he says is relevant to the subject-matter of inquiry. In *Starkie On Slander and Libel*, i. 285, it is said: "The same protection which is afforded to a party in a judicial proceeding is with some limitation extended to

a professional advocate. He is not subject to an action provided the facts which he alleges are pertinent to the cause, and are suggested by his client." In one of the most recent books on the subject, *Odgers On Libel and Slander*, it is said (p. 190): "Counsel engaged in a cause are privileged to speak any words, however defamatory, that are in accordance with their instructions and are pertinent to the matter in question. They may draw any inferences from the facts given in evidence, and make any imputations however calumnious, but they ought not to make reckless charges of which they can give no evidence. For strong and exaggerated words they cannot be called in question, unless the charge conveyed by such words be wholly unjustified by the evidence before the Court." Turning to the Scottish law, we find Mr. Bell, in his *Principles of the Law of Scotland*, saying (section 2051): "Parties are privileged in the statement of whatever they believe to be true and which is relevant to the cause unless malice is proved; and counsel have the same privilege, provided their statements be within their instructions." There are also *indicia* of opinion to the same effect in various cases. In the celebrated case of *Hodgson v. Scarlett*, 1 B. and Ald. 232, which was an action against Sir James Scarlett for having in a speech as counsel at a trial called the plaintiff a fraudulent attorney, the impression one has from the report of the judgment in favour of the defendant is that it was put upon the ground that the statement was relevant to the matter in issue; and certainly great weight was laid upon this circumstance. Lord Ellenborough said: "It appears to me that the words were uttered in the original cause, and were relevant and pertinent to it, and consequently that this action is not maintainable." Mr. Justice Bayley said: "The rule seems to me correctly laid down in *Brook v. Sir Henry Montague*, Cro. Jac. 90, 'that a counsellor hath a privilege to enforce anything which is informed unto him for his client, and to give it in evidence, it being pertinent to the matter in question, and not to examine whether it be true or false.' No mischief will ensue in allowing the privilege to that extent." Mr. Justice Abbott said: "The words were spoken in the course of a judicial inquiry, and were relevant to the matter in issue. I am therefore of opinion that no action can be maintained unless it can be shown that the counsel availed himself of his situation maliciously to utter words wholly unjustifiable." And Mr. Justice Holroyd said: "If the words be fair comments upon the evidence, and be relevant to the matter in issue, then unless express malice be shown the occasion justifies them. If, however, it be proved that they were not spoken *bona fide*, or express malice be shown, then they may be actionable; at least our judgment in the present case does not decide that they would not be so." In the case of *Mackay v. Ford* in the Court of Exchequer (*ut supra*), a case against a solicitor, Chief Baron Pollock said with regard to the statement

alleged to be defamatory: "The question is, Is it relevant? I think it was. The words were used by the defendant acting in the character of counsel in a court of justice, and being relevant to the matter in hand, the speaking of them was justifiable." In the well-known case of *Seaman v. Netherclift*, in 1877, L. R. 1, C. P. Div. 540, Lord Coleridge said: "It has never yet been decided that counsel would not be subject to an action for words spoken even during the conduct of a case if the words were irrelevant, *mala fide*, and spoken with express malice; all which qualities in the words it is to be observed are and must be questions of proof, and for the jury."

In view of these authorities, it certainly could not have been affirmed that counsel enjoys an absolute protection for any observations he makes in the course of the exercise of his professional duty. The distinction between the two views of the extent of the privilege is of the greatest practical moment. No doubt, taking the more limited view of his privilege, counsel would be protected if his statements were relevant to the matter at issue, but he would not be protected from actions to inquire whether the statement was relevant or not, and the consequent risk of being exposed to vexatious and groundless actions. In his opinion in the case presently to be noted, and which has suggested this article, Lord Justice Fry observed: "If we consider the number of statements made from time to time by advocates affecting the interests and characters of other persons, it is remarkable, and I may add creditable, to the profession, that hitherto no direct decision either affirmative or negative has been pronounced upon this point." To which we may add, that the circumstance also shows that the public are not likely to suffer any harm by the privilege undoubtedly possessed by counsel being allowed to them in its ampler form.

It had not at the time Lord Coleridge spoke been decided that a counsel is not subject to an action for words spoken during the conduct of a case, though the words are irrelevant, and spoken with express malice. This, however, has been decided now. In the recently reported case of *Munster v. Lamb*, L. R. 11, Q. B. Div. 588, the action was for words spoken by a solicitor in defending a prisoner at the petty sessions, which were defamatory of the prosecutor, and which were said to be irrelevant to the matter at issue. The prisoner was charged with having administered drugs to the servants of the prosecutor for the purpose of putting them in a state of stupor while a burglary was being committed by the prisoner's husband, for which burglary the husband had been convicted, and the prisoner acquitted on the ground that she had acted under the influence of her husband. In the course of his speech for the defence at the woman's second trial, the solicitor said: "I have my own opinion for what purposes all these young women are resident in the house" of the prosecutor. "I can believe that there may have been drugs in his house; and I have my own

opinion for what purposes they were there, and for what they may have been used." The suggestion was that the drugs were used for criminal or immoral purposes. In defending the prisoner on one criminal charge, the suggestion was made that the prosecutor had been guilty himself of another criminal offence. The Court of Appeal, affirming the judgment of the Queen's Bench Division, dismissed the action. The ground of the decision is clearly and explicitly stated by the Master of the Rolls: "For the purposes of my judgment I shall assume that the words complained of were uttered by the solicitor maliciously, that is to say, not with the object of doing something useful towards the defence of his client. I shall assume that the words were uttered without any justification or even excuse, and from the indirect motive of personal ill-will or anger towards the prosecutor arising out of some previously existing cause ; and I shall assume that the words were irrelevant to every issue of fact which was contested in the court where they were uttered ; nevertheless, inasmuch as the words were uttered with reference to and in the course of the judicial inquiry which was going on, no action will lie against the defendant, however improper his behaviour may have been." The scope of the learned judge's reasoning is this, that by a series of decisions as to the case of other classes of persons engaged in judicial inquiries, judges, parties, and witnesses, it has been decided that this absolute protection is possessed by them, and on inquiring into the principle underlying these decisions we find it is one which equally applies to the case of counsel.

As regards judges, the leading case is *Rex v. Skinner*, Lofft. 55. A borough justice had said to the Grand Jury in a General Session of the county: "You have not done your duty ; you are a seditious, scandalous, corrupt, and perjured jury." On a motion to quash an indictment against the justice for using these words, Lord Mansfield said: "Neither party, witness, counsel, jury, nor judge can be put to answer, civilly or criminally, for words spoken in office. If the words spoken are opprobrious or irrelevant to the case, the Court will take notice of them as a contempt, and examine on information. If anything of *mala mens* is found on such inquiry, the words will be punished suitably. The words are extremely improper. If the party were not a borough justice, I should think there might be grounds to apply to the Great Seal to remove him from his office, but to go on an indictment" (and, as Lord Coleridge remarked in *Seaman v. Netherclift*, the observation is equally applicable to an action) "would be subversive of all idea of a constitution." There have, indeed, been opinions expressed implying that Lord Mansfield's words are too general. In *Kendillon v. Maltby*, Car. and M. 402, Lord Denman said: "I have no doubt on my mind that a magistrate, be he the highest judge in the land, is answerable in damages for slanderous language, either not relevant to the cause before him, or uttered after the cause is at an

end; but for words uttered in the course of his duty no magistrate is answerable, either civilly or criminally, unless express malice and the absence of reasonable or probable cause be established." In *Thomson v. Churton*, 2 B. and S. at p. 479, Chief Justice Cockburn said: "I am reluctant to decide, and will not do so until the question comes before me, that if a judge abuses his judicial office by using slanderous words maliciously and without reasonable and probable cause, he is not to be liable to an action." A passage in Lord Wynford's judgment in the Scotch appeal case of *Robertson v. Allardyce*, 1 Dow and Cl. 495, has been referred to as to the same effect; but in that case Lord Wynford expressly stated that he was dealing with the question exclusively as one of Scottish law. But the question is really not now open after the decision in *Scott v. Stansfield*, L. R. 3 Ex. 220, in which the result of the authorities is summed up. The action was against a county court judge for words "alleged to have been spoken maliciously and without probable cause, and to have been irrelevant to the matter before him. . . . The question arises perhaps for the first time with reference to a county court judge, but a series of decisions uniformly to the same effect, extending from the time of Lord Coke to the present time, establish the general proposition that no action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice. This doctrine has been applied not only to the superior courts, but to the court of a coroner and to a court-martial, which is not a court of record. It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely, without favour and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. How could a judge so exercise his office if he were in daily and hourly fear of an action being brought against him, and of having the question submitted to a jury whether a matter on which he had commented judicially was or was not relevant to the case before him?"—*Per Kelly*, C. B. This passage shows that in England at least the absolute protection is not confined to the case of judges of the Supreme Court.

As regards parties, strange as it may seem to us, a similar extended privilege appears to be allowed. In *Seaman v. Netherclift*, L. R. 1, C. P. D. 540, Lord Coleridge said (at p. 544): "A long course of authorities, of which the best known as the most remarkable is *Astley v. Younge*, 2 Burr 807, has decided that no action of slander can be brought for any statement made by the parties either in the *pleadings* or during the conduct of the case. The law is so stated very clearly by Lord Eldon in *Johnson v. Evans*, 3 Esp. 32; it is so stated, not indeed with absolute certainty,

in a note to *Hodgson v. Scarlett*, by Mr. Justice Holroyd. But I conceive the law on this point to be now quite certain, although most men of any experience in the profession must have seen many instances in which judicial proceedings have been made by parties to them to serve the ends of private malignity." There is an obvious distinction between the case of a judge and that of a party. The judge must deal with a case that is brought before him, but a party need not raise an action unless he likes.

As regards witnesses, it has been held in many cases that "the rule is inflexible, that no action will lie for words spoken or written in the course of giving evidence," even if the statements are false and malicious. "Cresswell, J., pointed out in *Bevis v. Smith*, 18 C. B. 126, that the inconvenience is much less than it would be if the rule were otherwise. The origin of the rule was the great mischief that would result if witnesses in courts of justice were not at liberty to speak freely, subject only to the animadversion of the Court,"—*per* Crompton, J., in *Harrison v. Broomhead*, 4 H. and N. 569. Two later cases are now the leading cases upon the matter, and are conclusive on the question—*Dawkins v. Lord Rokeby*, L. R. 8 Q. B. 255, a case about evidence at a military court of inquiry, and *Seaman v. Netherclift*, L. R. 1 C. P. D. 540, 2 C. P. D. 53.

The principle underlying the cases as to judges and witnesses is, that the object of the protection recognised as necessary for persons engaged in judicial proceedings, viz. to leave them free and unembarrassed, cannot be attained unless the protection afforded is an absolute protection. Under a rule that the judge or witness is protected only when what he says is relevant, the judge or the witness would have a protection more nominal than real. What advantage would a privilege be, that the statements are not actionable so long as they were relevant, if it should involve one in actions to determine whether they were relevant? It is necessary for the protection of judges and witnesses that the rule should be so absolute. Nor are the public left unprotected. The surest check upon the abuse of the judicial office is the judge's sense of honour and integrity. If, however, he should act wrongly or speak maliciously, he can be removed by a higher authority. The same reasons apply in the case of a counsel or advocate. There are equal reasons for enjoying the protection, and there are similar checks upon the abuse of the privilege. The Master of the Rolls observes: "Of the three classes—judge, witness, and counsel—it seems to me counsel has a special need to have his mind clear from all anxiety. His position is one of the utmost difficulty. He is not to speak of that which he knows; he is not called upon to consider whether the facts with which he is dealing are true or false; what he has to do is to argue as best he can without degrading himself in order to maintain the proposition which will carry with it either the protection or the remedy he desires for his client. If he were called upon during

the heat of his argument to consider whether what he says is true or false, whether what he says is relevant or irrelevant, he would have his mind so embarrassed that he could not do the duty which he is called upon to perform. Far more than a judge, infinitely more than a witness, he wants protection on the ground of benefit to the public. If the rule of law were otherwise, the most innocent of counsel might be unrighteously harassed with suits, and therefore it is better to make the rule of law so large that an innocent counsel shall never be troubled, although by making it so large counsel are included who have been guilty of malice and misconduct."

The Scottish law has not taken so liberal a view of the extent of the privilege of counsel. As stated in the passage quoted from *Bell's Principles* (sec. 2051), the statements of counsel are privileged only if pertinent to the cause and within their instructions, unless malice is proved. As regards the kind of malice required to be proved, the same rule applies as in the case of statements by parties which has been thus stated: "Proof of malice must amount to this, that in making the statement complained of, the defender acted not with a view to maintaining his case in the litigation, but with a mind to injure the pursuer," *per* L. J.-C. Inglis, in *M'Kellar v. Duke of Sutherland*, 24 D. 1124. Why the privilege of counsel has been so limited by our law, is obvious. The large protection allowed to an advocate by the Court in *Munster v. Lamb* was allowed because of the large protection already allowed in analogous cases of persons engaged in judicial inquiries. But in Scotland protection in cases of judicial slander generally has been dealt out with a more sparing hand. Let us briefly note the leading cases on the subject. As regards Judges of the Supreme Court, in *Hagart v. Hope*, June 1, 1821, F. C., affirmed by the House of Lords April 1, 1824, 2 S. Ap. 125, it was held that an action of damages is not competent against a supreme judge for a censure passed by him while acting in his judicial capacity on a counsel practising at the bar, and engaged in the cause then before the Court, although it was alleged generally that the censure had been made from motives of private malice, and for the purpose of injuring the pursuer in his professional character. Lord President Hope had made this among other similar observations: "Mr. Hagart has, as is his usual practice, stated facts and circumstances of which there is no evidence on the record, and which live in the memory and recollection of that gentleman alone." In the House of Lords, Lord Gifford pointed out that if such actions were allowed, it would go at once to subvert the independency of judges, and be found upon very short experience to operate most prejudicially upon the interests of the suitors themselves. One reason against such actions is special to the case of actions against a judge. It was remarked that there being "no ground for the distinction endeavoured to be drawn between

language used by a judge upon the bench and any other judicial act," the consequence of allowing such an action would be that "any judgment might be canvassed by an unsuccessful party for the purpose of grounding upon it an action of damages against the judge." Then, as there was no reason why such an action should not be raised in the inferior Court, we might have the spectacle of the inferior Court overhauling the proceedings, and even reversing the decision, of the superior Court. As regards the malice alleged, it was said: "To admit of such evidence of malice as has here been offered (evidence to be derived merely from construction of the words themselves), would be to make way for the utmost confusion and mischief in the administration of justice." Referring to this case in the subsequent case of *Robertson v. Allardice*, April 8, 1830, 4 W. and S. 102, Lord Wynford said the judges were "perfectly right" in holding that such an action against a judge of the Supreme Court could not be maintained: "I certainly should hold that the judges of the Court of Session are protected, and they cannot, as they were disposed to do in this case [that is, Lord President Hope was disposed to do], reject that protection. It was not given to them for their benefit, but to prevent the administration of justice from being degraded, and to prevent angry feelings from arising amongst the members of a Court from co-ordinate magistrates judging each other."

A justice of peace, however, has not been held entitled to absolute protection. In the case of *Robertson v. Allardyce*, it was held by the House of Lords, affirming the judgment of the Court of Session, on this point, that a justice of peace is not protected against an action for a verbal slander averred to have been made maliciously in giving judgment on a person under trial before him. Lord Wynford said: "Consideration must be had for the situation in which the magistrates are placed, and we must also take into consideration the protection due to those who are living within the districts in which the magistrates are to administer justice, so as to secure to the magistrates that degree of independence which is essential to the administration of justice on the one hand, and to protect the public against oppression on the other. I think these great objects will be completely attained if you protect magistrates in all cases in which, although they act indiscreetly, they are uninfluenced by any motives like those of malice." The case seems to have been treated as an ordinary one of privilege, and the action failed simply because there was no proof of malice other than the words themselves. In allowing such an action, the House founded much upon the distinction between the supreme and the inferior Courts, viz. that to allow an action against a judge of a supreme Court would lead to the indignity and anomaly of the conduct or decision of a supreme judge being subject to the review of his equals or even his inferiors. The reason, however, which has been acted upon in England, that to make the protection practically effective,

a judge should not be exposed to frivolous and groundless actions, applies to an inferior as well as to a superior judge. This case of *Robertson* illustrates the loss and annoyance which may be incurred by allowing only a limited protection. A shoemaker, described in his pleadings as "a man of unimpeachable moral character," was tried for poaching. He pleaded guilty, and his agent asked for the leniency of the Court. One justice said to the other the man did not deserve mercy, for besides being a poacher he was a thief. As Lord Wynford remarked, "the character of the accused was not only a matter for the consideration of the Court, but it was the only matter they had to consider. The defamation complained of is in the magistrates' answer to the appeal." This led to an action and a jury trial. The magistrates were successful in the end, but only after going to the House of Lords. It is enough to deter men from becoming magistrates, if they are to suffer the annoyance and expense attendant even upon the successful defence of an action, raised by a person of unimpeachable moral character who poaches, because of the consideration they have properly given to a special appeal for mercy.

In two cases against sheriff-substitutes, *Hamilton v. Anderson*, June 11, 1856, 18 D. 1003, affirmed June 18, 1858, 3 M'Q. 363, and *Watt v. Thomson and Ligertwood*, July 18, 1868, 6 M'P. 1112, affirmed May 24, 1870, 8 M'P. (H. L.) 77, the actions were held unsustainable, at least without an averment, not of malice generally, but of express malice. But these cases had reference to judicial acts, not to defamatory expressions used by a judge, cases which Lord Chelmsford said had no application to the question before him.

As regards the statements of parties in their pleadings, we have certainly not gone so far as the English Courts have. According to the statement of Lord Coleridge, a party would be protected although the statement were intended to gratify private malignity, not to further the suit. It is not so in Scotland. To be privileged, the statement must be pertinent to the matter in issue, and the privilege is overcome by proof of actual malice, the proof required being that the statements were made not with a view to further the cause but to injure the pursuer.

It seems to us that the broad rule of absolute protection which has now been laid down in England with regard to all classes of persons engaged in judicial inquiries, judges, counsel, and witnesses, is the right rule, and is preferable to one narrowed by limitations which practically defeat its professed object of affording protection. Except as regards parties to a suit, who are not under the same necessity as judges, counsel, and witnesses, of taking part in such inquiries, and who are not subject to the check of censure or deprivation of office, we think the rule which ought to prevail is that which is thus stated by Chief Baron Kelly in *Dawkins v. Rokeby*: "Whatever is said, however false or injurious to the character or interests

of a complainant by judges upon the bench, whether in the superior Courts of law or equity, or in County Courts or Sessions of the Peace, by counsel at the bar in pleading cases, or by witness in giving evidence, is absolutely privileged, and cannot be inquired into in an action at law for defamation." As regards counsel, we think experience has shown that the privilege of unlimited freedom of speech stands in no danger of abuse. The true safeguard against its abuse is to be found not in the penal terrors of an action of damages, but in the spirit of professional honour and in the influence of professional opinion. If these should fail in the case of any counsel or other advocate, there would remain another check, for the undue laxity of speech would assuredly meet with prompt and effective correction at the hands of the Court and the professional body to which he belongs.

THE AGRICULTURAL HOLDINGS (SCOTLAND) ACT, 1883.

THIS Act, which comes into operation upon the 1st of January 1884, may conveniently be divided into two parts. The first relates to compensation for improvements, the second to the termination of a tenancy. We proceed to note its leading provisions. A *lease* under this Act is defined to mean "a letting of, or agreement for the letting, land for a term of years or for lives, or for lives and years, or from year to year." The *landlord* means any person for the time being entitled to receive the rents and profits; and the *tenant*, "the holder of land under a lease;" and in the case of both of these terms there is included "the executors, administrators, assignees, legatee, disponent, or next of kin, husband, guardian, *curator bonis*, or trustees in bankruptcy." The Act does not apply to holdings which are neither agricultural nor pastoral, nor used as market gardens, nor to such as are connected with the occupancy of an office under the landlord. The principal object of the Act is to enable tenants to recover compensation for improvements made by them upon their holdings during the currency of their leases. Such improvements are, of course, of various kinds. The Act has made a distinction by dividing them in the annexed schedule into three classes, viz. (1) those to which the consent of the landlord is required; (2) of which notice to the landlord is required; (3) to which no consent is required. An examination of this schedule will show upon what principle our legislators have proceeded. The improvements to which the landlord's consent is required, include something more than what is necessary for reaping the best return from the ground. They embrace such operations as may alter the character, or at least the appearance, of the subject let, and such as in most cases will entail

a heavy outlay. It is reasonable, therefore, that the landlord should have an opportunity of exercising his veto ere expensive undertakings, it may be of doubtful utility, are gone into. The erection of a building—the formation of a garden—the reclamation of waste land—the making of silos and similar works, will therefore have to be carried out at the tenant's own risk, unless he in the first place obtains the landlord's consent. On the other hand, where the subject let is merely improved by laying down manure, either natural or artificial, or by the consumption on the holding of feeding stuff not produced by the holding, the tenant is entitled to compensation without having obtained any consent. Draining is the only operation of which it is necessary to give notice to the landlord.

Another distinction arises from the date at which the improvements were executed. With two exceptions, there is to be no compensation for improvements executed prior to the commencement of this Act. The following are the exceptions. If a tenant can show that within the last ten years he has executed an improvement for which no consent of landlord would now be necessary, and for which he is not entitled under contract or custom to recover compensation, he may obtain the benefit of this Act. Further, he may recover even for improvements of the first class, and for drainage executed within the period of ten years, if during the year 1884 he can obtain the landlord's written approval of what he has done.

Consent of landlord.—Provision is made for obtaining the consent of the landlord, where that is required, in section 3 of the Act. It must be in writing, but the writing which contains it need not be executed with statutory solemnities (S. 41). An agent duly authorized may give it on the landlord's behalf, and it may be either conditional or unconditional, the landlord and tenant being at liberty to make agreements as to the compensation. Where the improvement for which compensation is to be sought consists of drainage, notice must be sent to the landlord or his agent (4) not more than three months or less than two prior to the commencement of the work, and the parties may make agreements regarding it, the landlord himself executing the work and charging interest. When leases current at the passing of the Act have limited the outlay upon drainage to a particular sum, the tenant will be unable to recover more than this at the expiry of the lease. Under such leases also, if they provide either by special agreement or custom specific compensation for any kind of improvement, compensation is to be paid in pursuance of this agreement or custom; (5) and even in a lease beginning after this Act comes into operation any particular agreement in writing, if it secures "fair and reasonable compensation," is to be given effect to.

Then follow the *regulations for ascertaining the proper amount of compensation*. In the interest of the landlord there is to be

deducted any benefit which he has given to the tenant in consideration of the tenant executing the improvement, and when the tenant has sold off or removed any crop, the value of the manure which would have been produced by consuming this crop upon the holding. Further, the rent, taxes, and public burdens payable by the tenant, sums due for breach of the lease's stipulations, or on account of deteriorations, all form proper deductions from the amount to be awarded as compensation for improvements. Upon the other hand, in the interests of the tenant, there is to be added any sum due to him for the breach of a stipulation committed by the landlord. Acts of the tenant which may have caused deterioration, or have been breaches of his obligations, but which have been committed more than four years prior to the expiry of the lease, cannot form the ground of a deduction in favour of the landlord. The tenant must give notice in writing to the landlord of his intention to claim compensation at least four months prior to the expiry of the lease. The landlord, up to fourteen days thereafter, is entitled to give a counter notice of his claim for compensation. It is only when parties fail to agree that the referee is to be sent for. They may select a single referee, or each have a referee. When the parties fail to appoint a referee, or the referees do not nominate an oversman, the sheriff has to step in and exercise the duties imposed upon him by the Act. Every notice to the other side, and every appointment made, must be in writing. Either of the parties may have the oversman appointed by the Sheriff (10). When a referee is appointed, his appointment cannot be recalled except of mutual consent.

Extensive powers are given to the referees by section 12. They may call for the production of samples and vouchers, and take the evidence of witnesses upon oath. They may proceed in absence of either party after due notice. A single referee must pronounce his award within twenty-eight days, and even in the case of two the longest time allowed for avizandum is forty-nine days. An oversman has also forty-nine days as the maximum. Failure to decide within the proper time in the case of two referees opens the way for the oversman. But the Act does not appear expressly to provide for the case of a single referee or the oversman himself being behind time. In such event it would seem that the reference falls to the ground, as the referee has become incapable of acting.

The *award* must go into details, and must (17) state the several improvements for which compensation is awarded, the date of their execution, and the facts taken into account in reducing or augmenting the amount awarded. The referees have power to award expenses, and determine by whom or in what proportions they are to be borne. The expenses may be taxed. There is an appeal to the Sheriff when the sum claimed exceeds £100. In England there is a similar appeal to the judge of the County Court, who may state a case on a question of law to the High Court. But in Scotland the Sheriff

is final. The appeal must be upon certain grounds stated in section 20.

By recording an award, which may be done if the money awarded is not paid within a month, execution can pass in common form (21). The landlord who makes compensation or executes improvements can, under judicial authority, have the sums so expended charged upon his estate.

Removing for non-payment of rent.—The Act (27) deals with the case in which a landlord's right of hypothec has ceased. When six months' rent is due and unpaid an action of removing may be brought, and unless the tenant pays the arrears or finds caution for them, and for the rent of the year to follow, he may be removed at the term which ensues next after the bringing of the action. But the tenant has all the rights of outgoing tenant. The 2nd and 3rd sections of the Hypothec Abolition Act are repealed, and the Act of Sederunt of 1756 is declared to have no application to the cases dealt with by section 27 of the present Act.

Notice of termination of tenancy.—A most important alteration has been introduced under this head. A lease is not now to come to an end unless written notice of the intention to terminate it is given by either landlord or tenant. In the case of leases extending over three years and upwards the notice must be not less than one year nor more than two years before its termination. In shorter leases six months is the period fixed upon. Failing such notice tacit relocation operates as at present, when the shorter statutory intimation has not been given. This new provision does not apply to the case of land resumed for building or planting purposes under a power reserved in the lease.

The right to *bequeath his lease* (29) is a new power given to the Scottish tenant. The privilege is so hedged about that it cannot be really prejudicial to the landlord. The legatee must give the earliest possible intimation of the bequest to the landlord, that is to say, if the former wishes to accept the legacy this intimation binds him to accept it. The landlord has a month to make up his mind upon the question of accepting the new tenant. If he refuses to take him, the legatee can bring the matter before the Sheriff, who may either approve of the landlord's refusal and declare the bequest null and void, or give effect to it, and establish the tenant in the farm. The Sheriff's decision is final.

The *law of fixtures* has been materially altered. When a tenant (30) erects a fixture for which he is not entitled under the Act to compensation, and which he was not bound to erect, it becomes his property, and may be removed by him, provided that he has paid his rent and otherwise performed his obligations. He must give one month's notice of his intention to remove it, and the landlord may purchase it at a fair value, the value to be fixed by reference if necessary. The tenant must remove it without doing unnecessary damage, and must pay for the damage which is done.

The Act applies to Crown lands. But a minister may not exercise the powers conferred by it on a landlord without the sanction of his presbytery, nor trustees for educational, ecclesiastical, or charitable purposes, except with the approval of the Secretary of State. No tenant can contract himself out of this Act. Where, with the consent of his landlord, an incoming tenant has paid compensation for improvements to the outgoing tenant, the former, when his time to leave arrives, is to be entitled to recover from the landlord. A change of tenancy during a tenant's occupancy of a holding is not to affect his right to compensation.

Such is a very brief statement of the leading provisions of this most important Act. That many questions of difficulty will arise under it is obvious. That it will satisfy all parties, we fear, cannot be expected. But even advanced land reformers admit that it is a step in the right direction.

LEGACIES GIVEN IN A PARTICULAR CHARACTER.

(Continued from page 514.)

THE same principles as those applied in the case of a bequest to a "wife," when the person claiming under that character was not possessed of it in its strict sense, that is to say, was not the lawful wife, have been applied in the case of bequests to "legitimate children," or to a "child" or "children," which, by a presumption difficult to overcome, is held to mean lawful children,—the application of these principles, however, being subject to a certain limitation thought to be required by a principle of public policy. *Standen v. Standen*, 2 Ves. Jun. 589, is an instance of this class of cases. A testator by his will left a sum to "Charles Millar Standen and Caroline Elizabeth Standen, legitimate son and daughter of Charles Standen, now residing with a company of players." The testator bequeathed a moiety of the residue of his estate in trust for Charles Millar Standen and Caroline Elizabeth Standen, legitimate son and daughter of Charles Standen; and if both died before majority or marriage, in trust for "such of the legitimate children of Charles Standen" as should be living at the death of the survivor of these two. The other moiety was given to the testator's wife for her life, and after her death to any persons she might by will appoint, and, failing appointment, to "all the legitimate children of Charles Standen living at his decease, share and share alike." Charles Standen, the player, had married, and had one child, Charles Standen. He separated from his wife, married another woman, with whom he lived as his wife till her death, and had issue by her, Charles Millar Standen, Caroline Elizabeth Standen, and other children. The questions were, (1) whether Charles Millar Standen and Caroline Elizabeth Standen were entitled to the interests given them by name, but under the

wrong description of legitimate children; and (2) the testator's widow having died, whether, if the power of appointment by the wife had not been exercised as to the moiety of the residue life-rented by her, these and the other illegitimate children, the offspring of the second union, were entitled to share with Charles Standen, the only legitimate child. The second question did not require to be decided, as the power of appointment was held to have been duly exercised; but it was held that the bequests to the persons mentioned by name were valid. Lord Chancellor Loughborough said: "As to Charles Miller Standen and Caroline Elizabeth Standen the question is not very great, for a wrong description certainly will not take away their legacies. The argument is a strong one, that if he meant those two as legitimate children, he must mean all subsequent children of the same marriage to be legitimate; and yet I do not know how to bring them in as legitimate children when they are not so."

In many cases, however, persons not called by name have been brought in as legitimate children who were not so. Bequests to a "child" or "children" mean *prima facie* to lawful children, just as a bequest to a "wife" is to a lawful wife. See Lord Eldon's remarks in *Wilkinson v. Adams*, 1 V. and B. 422. There are, however, two classes of cases in which, although there is no mention of the name, illegitimate children have been held to come in under the character of "children." In *Hill v. Crook* (1873), L. R. 6, E. and I. App. 265, Lord Cairns laid down the principles applicable to these cases as follows: "What appears to me to be the principle which may fairly be extracted from the cases upon the subject is this: The term 'children' in a will *prima facie* means legitimate children, and if there is nothing more in the will, the circumstance that the person whose children are referred to has illegitimate children will not entitle those illegitimate children to take. But there are two classes of cases in which that *prima facie* interpretation is departed from. One class of cases is where it is impossible, from the circumstances of the parties, that any legitimate children could take under the bequest. A familiar example of that might be given in this way: Suppose there is a bequest 'to the children of my daughter Jane,' Jane being dead, and having left illegitimate, but no legitimate children. There, inasmuch as the testator must be taken to have known the state of his family, and must be taken to have intended to benefit some children of his daughter Jane, and inasmuch as she had no children who could be benefited except illegitimate children, rather than that the bequest should fail altogether, the Court will hold that those illegitimate children are intended, and they will take under the term 'children.' . . . The other class of cases is of this kind: Where there is upon the face of the will itself, and upon a just and proper construction and interpretation of the words used in it, an expression of the intention of the testator to

use the word 'children,' not merely according to its *prima facie* meaning of legitimate children, but according to a meaning which will apply to, and which will include, illegitimate children. . . . Suppose a testator were to say in his will, 'being aware that my daughter, who is now married to her husband, had before her marriage children by the same person, who in law are illegitimate children, and it being my intention to provide for all the children of my daughter, I give funds to trustees upon trust for her for life, and after her death to divide the funds among the children of my said daughter,' I apprehend that no person would hesitate to say that the testator had shown upon the face of his will by the words which he had used his intention in a way that could not be mistaken to use the generic term 'children' so as to include illegitimate children along with legitimate children." In *Hill v. Crook*, illegitimate children were allowed to come in as "children" of a marriage referred to by the testator in the following circumstances: A man had entered into a second marriage with his deceased wife's sister—a union known and assented to by the testator, the father-in-law. In the will the testator spoke of this man, John Crook, as his son-in-law, and devised estates in trust for his "daughter Mary, the wife of the said John Crook," which estates were to go after her death to "the children of my said daughter Mary Crook." In several other places in the will Crook and the daughter were spoken of as husband and wife. The children of the union had been treated by the testator as his grandchildren. On Mary's death the House of Lords (Lords Chelmsford, Colonsay, and Cairns) held that there was a sufficient designation of the illegitimate children, the offspring of this union, as the intended objects of the testator's bounty, and consequently that the bequest to them was valid. It is to be observed that in this case all the children were born in the lifetime of the testator. A very recent case in which an illegitimate child was entitled to a legacy as a "child," the intention of the testator to favour not being able to be fulfilled unless this was done, is that of *Smith v. Milledge*, August 4, 1883. A testator bequeathed "to A., the eldest daughter of my deceased daughter S., my gold watch" and other property "in trust for such of the children of my deceased daughter S. as shall attain the age of twenty-one years, absolutely, equally share and share alike, the shares of such of them as shall be daughters to be for their sole and separate use." The deceased daughter S. had had three children, the eldest of whom (the daughter A. to whom the gold watch was given) being illegitimate, the other two, a son and a daughter, being legitimate. Unless the illegitimate child was included in the term children there were not "daughters" of S., and the bequest to "daughters" would not have complete effect. Taking this into account, and also the previous mention of A. as a daughter, the illegitimate child was held by North, J., to be entitled to succeed. On the other hand, as an illustration of the difficulty

of overcoming the legal presumption of the term "children," as meaning "lawful children," we may refer to *Dorin v. Dorin* (1875), L. R. 7, E. and I. App. 568. A man who had had two illegitimate children by a woman married her, and the day after the marriage made a will leaving her his estate for life, and giving her power to dispose by will of the property "amongst our children" at her death; and if she made no will, then the property was to be divided between "my children by her." No child was born after the date of the will. The testator lived for some time after, and always treated the two illegitimate children as his own. The House of Lords held that the children took nothing;—there being nothing in the will compelling one to give to the term "children" a meaning other than its ordinary legal meaning in order to satisfy an evident intention of the testator. "Supposing," said Lord Cairns, "that it had been in the mind of the testator not to take any notice of these children in his will, or to make any provision for them by his will, but to make a provision for them in some other way, and to use his will to designate merely his wife and any legitimate children who might be afterwards born, would not every word in the will be satisfied? Undoubtedly it would. Therefore you are not able to say that the will upon the face of it constrains you to depart from what is the ordinary and *prima facie* meaning of the word 'children.'"

It may be questioned whether the disinclination to bring in under the character or description of "children" any but lawful children, has not been pushed too far in such a case as that of *Dorin v. Dorin*. It can hardly be doubted that the testator who made the will immediately after he had made the mother of these children his lawful wife, who according to the laws of some countries—Scotland, for example—would by this act have made the children his lawful children, who had regarded and continued to regard them as his children, meant to favour them, and that his bounty to "my children by her" was not intended to extend merely to possible future children. There is undoubtedly something arbitrary in the canon of construction that is applied here. By the mode of construction adopted in this class of cases, the endeavour is not to discover the intention of the testator, but only to avoid going right in the face of the intention. There is great force in the observation of Lord Selborne in *Dorin's* case: "I am by no means sure that the law would not be in a better state than it is in at present if the word 'children' in a will were regarded as large enough when used concerning the children of the testator by a particular woman, to include within its proper and *prima facie* construction any children living at the date of the will who might be recognised by the testator as being his own by that woman, as well as those who might afterwards be procreated between them in actual marriage. But it is perfectly well settled as the law now stands, that the word 'children' in a will means legitimate children, unless when the

facts are ascertained and applied to the words of the will some repugnancy or inconsistency (and not merely some violation of a moral obligation or of a probable intention) would result from so interpreting them."

The rational principles of construction which ought to be applied in this class of cases have been hampered and arbitrarily restrained in their operation by considerations of supposed public policy disfavoured bequests to illegitimate children. Thus it is only within recent years that under a gift to "children," with a clear intention that it should apply to existing illegitimate children, existing illegitimate children could have a claim if the gift had to be extended to future legitimate children, or that a gift to illegitimate children not born at the date of making a will, would stand, even when the union of which they were the offspring was pointed out. Nor even yet will a gift to future illegitimate children not *in esse* at the testator's death be held valid. There has been a modification of the old principle applied to this class of cases, and as the law stands in England some extremely fine distinctions have been drawn. In *Pratt v. Mathew* (1856), 22 Beav. 328, as we have seen (*ante*, p. 511), a legacy to "my wife" was held to belong to the testator's deceased wife's sister, with whom he had gone through the ceremony of marriage, and who at the date of the will was living with him as his wife, and continued so to live until his death. But a legacy in this will "to my children hereafter to be born" was held not to fall to a child born two days after the date of the will, and who up till the death of the testator, in the following year, was treated by him as his lawful child. It is clear enough that this child, of whom the so-called wife was pregnant, was intended to be favoured, and probably the near approach of the birth was the immediate occasion of the will being made. But the prejudice of the law against gifts to future illegitimate children was, at the date of the decision, strong enough to defeat the evident intention of the testator. Lord Romilly, M.R., said: "It is quite settled that a bequest cannot be made by a man to his future illegitimate children, for they can have acquired no title by repute. It is not necessary to consider whether a gift to the illegitimate children of a woman is valid; that has never been determined." (In the case of *Medworth v. Pope*, 27 Beav. 71, Lord Romilly thought it necessary to decide the question reserved in *Pratt's* case, laying down generally, that "in respect of future illegitimate children the law will not allow them to take under any description whatever.") In *Pratt v. Mathew*, Lord Romilly continued: "It is also clear that illegitimate children cannot take under a gift to children, unless it be quite clear that legitimate children never could have taken under the gift. This it is obvious is not the case here; the gift is 'to my children hereafter to be born.' This would obviously include the children he might have by any subsequent marriage." (This, however, is no longer the law since

the decision of the House of Lords in *Hill v. Crook*, Lord Chelmsford there saying: "I know of no objection in law to a gift to children with a clear intention that it shall apply to existing illegitimate children being so applied, although after-born illegitimate children must be excluded, and the gift be extended to future illegitimate children.") Lord Romilly proceeded: "But it is contended that this is a designation of the child then about to be born, and it is undoubtedly true that a child *en ventre sa mère* may acquire a name by reputation although illegitimate. But I have found myself obliged to come to the conclusion that this is not such a description of this child about to be born as will enable it to take. I look in vain to find any words which point out an express description of such child. If I found any words in the will importing a child *in esse* or about to be born, I should be able to say that this was a description of the child; this is not so, and there are no words in the will which point to this particular child; it is nothing more than the description of a class. It is true that if this had been the case of a valid marriage and a legitimate child, these words would include the child in existence, and thence it is argued that it will include the illegitimate child in existence when the will was made. But the objection is this: That the illegitimate child in the case supposed would take only as one of a class, and that if the illegitimate child takes by analogy to that rule, he must also take as one of a class, but the class of which he is to form one is 'my children hereafter to be born,' which extends only to legitimate children and excludes illegitimate." In short, the operation of the rule against bequests to future illegitimate children defeated what was acknowledged to be the intention of the testator. In several other cases the disqualification of future illegitimate children has been laid down in very absolute terms. In *Barnett v. Tugwell*, 31 Beav. 236, Lord Romilly said: "It is admitted that no bequest in favour of after-born illegitimate children can be supported." In *Howarth v. Mills*, L. R. 2, Eq. 389, Lord Hatherley, then Vice-Chancellor Wood, held a gift by a woman who had gone through the ceremony of marriage with her deceased sister's husband to be void as to her children born after the date of the will, the words of the gift being "to each and every of my children, legitimate or otherwise, which shall be living at the time of my decease." In *Hill v. Crook*, in the House of Lords, Lord Chelmsford observed: "No gift, however express, to unborn illegitimate children is allowed by law, nor under a gift good as to illegitimate children as a class will after-born illegitimate children be permitted to take;" and Lord Colonsay observed: "The testator could not by any form of words make an effectual bequest in favour of after-born children of that marriage,"—a marriage with a deceased wife's sister. But in more than one later case, without desiring to derogate from the rule stated in these general terms by Lords Chelmsford and Colonsay, the Courts have held it did not

apply in the case of a child *en ventre sa mère*. In *Occleston v. Fullalove* (1873), L. R. 9 Ch. App. 147, a testator had gone through the ceremony of marriage with his deceased wife's sister. She had two daughters C. and E. by him, and at the date of the will was pregnant of a third. The testator left a legacy in trust for his wife M. L., and after her death for his reputed children C. and E. and all other children which he might have or be reputed to have by M. L., then born or thereafter to be born. The third child *en ventre sa mère* at the date of making the will, but born during testator's lifetime, and reputed to be his, was held to be entitled under this destination. This was the view of the majority of the Court of Appeal, Lords Justices James and Mellish, Lord Selborne dissenting. Lord Justice James said: "If the case had been the case of a child *en ventre sa mère* at his death, there might have been a great and perhaps an insuperable difficulty in attributing reputation of paternity in the male, while there was nothing but signs more or less visible of a possible or probable parturition expected of and by the female. But in this case it appears to me the very case is contemplated and provided for by the testator so far as he could by law provide for it. Between the date of the will and the time of his death a child was with his knowledge born of the body of the woman while she was living with him as his wife."

Lord Justice James discriminated between the case of a child *in esse* and one unbegotten. In the former case there could be no pretext for saying that the gift was an encouragement to immorality. His Lordship distinguished the motive of the bounty and the consideration or inducement: "The law does not pretend to deal with the motive of the testamentary bounty or any other bounty. The testator's bounty is absolute and without control as to motive." In the later case of *In re Goodman's Trust* (1874), L. R. 17, Eq. 344, the testatrix, who had married the husband of her deceased sister, made a bequest to "all and sundry her children by the said R. P.," her reputed husband. She had two children by him, one born at the date of the will, the other after, but a few weeks before the testatrix' death. There could be no doubt here as to the repute. Both children were held entitled. Sir George Jessel, M.R., said: "The principle of the decision of *Occleston v. Fullalove*, as I understand it, is this, that a gift by a testator or testatrix to one of his or her children by a particular person is perfectly good if the child has acquired the reputation of being such child as described in the will before the death of the testator. If so, this case clearly falls within it." In a still later case, *Hill v. Crook* (1876), L. R. 3 Ch. Div. 773, a still further advance was made, and this case shows the extent to which the law will go, and beyond which it refuses to go, in allowing unborn illegitimate children to come in under a bequest to children, or under any form of expression. In that case the bequest by the grandfather to the "children" of the union between a man and

his deceased wife's sister was held to include a child *en ventre sa mère* at the date of the will, although not born until *after the death of the testator*. Vice-Chancellor Hall said: "It is clear that the testator, meaning as he did by the word 'children' the issue of that union, he must be taken to have meant to include a child *en ventre sa mère*. The only question is whether there is any ground in public policy which prevents such a child taking. I think there is not, for the child having been already procreated, there can be no encouragement to immorality in providing for it." But as regarded a child who was both begotten and born after the testator's death, although a child of the union countenanced and intended to be favoured by the testator, it was held the child could not take, his taking being against the policy of the law.

It seems to us that the stringency of the law might be still further relaxed. When a union pointed out and intended to be favoured by the testator is recognised so far that the person holding the position of wife under it is entitled to take in the character of "wife" and the existing offspring as "children," why should it not be recognised so that all the offspring of it should be entitled to take as children? In the first case of *Hill v. Crook*, Lord Cairns said: "It appears to me that the terms 'husband' and 'wife,' 'father' and 'mother' and 'children,' are all correlative terms. If a father knows that his daughter has children by a connection which he calls a 'marriage' with a man whom he calls her 'husband,' terming the daughter the 'wife' of that husband, I am at a loss to understand the meaning of language if you are not to impute to that same person, when he speaks of the children of his daughter, this meaning, that as he has termed his daughter and the man with whom she was living 'wife' and 'husband,' so also he means to term the offspring born of that so-called 'marriage' the children according to that nomenclature." This reasoning applies equally to the case of children unborn and unbegotten. If the testator means to term the offspring born of the so-called union "children" according to the nomenclature he has employed, so also does he mean to term the children to be born. So far as the intention of the testator is concerned, it is clear that the testator desires to recognise the union as a marriage, and all the results of the union future as well as present. Any limit given to his intention has merely the effect of punishing the innocent offspring. As regards the justification for limiting the effect of the testator's intention, on the ground of public policy, viz. the discountenance to be shown to unlawful unions, that objection has been waived the moment that the union has been recognised as a marriage, to the extent of recognising the woman as the "wife" and the existing children as "children," and this is done when even the testator has so recognised them. As regards the reason for giving to bequests to illegitimate children effect in the case of existing children, that they are intended to

provide for beings already in existence, this reason does not support all the decisions in the case of a child *en ventre sa mère*. The existence of such an intention implies knowledge on the part of the testator that there was a child *en ventre sa mère*. This knowledge has not always been required, for the bequest has been held good not only where the testator is the parent, in which case probably knowledge is to be presumed, but also where the testator is another than the parent, in which case knowledge most likely does not exist, and certainly is not to be presumed.

In M'Laren *On Wills*, i. 642, it is said: "It does not appear that in any case a claim has been put forward in our Courts on behalf of illegitimate children to the benefit of a designative bequest;" and there does not seem to have been any cases of that kind since the publication of the work. Indeed, the Scottish reports are singularly barren of cases of the class treated of in this article.

A recent case, in which persons were held entitled to a legacy given in a character which, strictly speaking, they did not possess, is that of *Drylie's Factor v. Robertson*, July 20, 1882, 9 R. 1178; where legacies given to "my second cousins" were held to be claimable by first cousins once removed, the term second cousins being commonly used to describe persons in this relationship, and the testator having himself in his will used it in describing a person who stood in this relationship.

A leading case on the subject of legacies given to a person in a particular character is that of *Rishton v. Cobb*, 5 My. and Cr. 145. The testator left certain stock to trustees upon trust "to authorize and empower Lady Fanny Campbell, widow of Major-General Sir Niel Campbell, to receive the dividends as they become due *so long as she shall continue single and unmarried*." Unknown to the testator, she had entered into a second marriage, and was married at the date of the bequest. Notwithstanding this, Lord Cottenham held she was entitled to the bequest. In the case of *In re Boddington*, L. R. 22, Ch. D. 597, Mr. Justice Fry expressed a doubt as to whether he properly apprehended the principle on which this case was decided. To prevent misapprehension as far as possible, we quote somewhat at length Lord Cottenham's opinion: "After looking through all the cases upon the subject, I do not find that I can better define what circumstances will make the legacy void than by adopting the words of Lord Alvanley in *Kennell v. Abbott* (4 Vesey, at p. 809), namely, that when a legacy is given to a person under a particular character which he has falsely assumed, and which alone can be supposed the motive of the bounty, the law will not permit him to avail himself of it, and therefore he cannot demand his legacy. I think the evidence in this case fails to bring it within this definition. That the plaintiff, notwithstanding her marriage, continued to call herself Lady Campbell, was not of itself an assumption of a false character. That is so generally done after a marriage with a second husband of inferior rank to

the first, that no imputation of improper motives can be founded on it. There is, however, evidence of her having concealed her second marriage, or at least of her having permitted those with whom she lived, and amongst others the testator, to assume and believe that she had not been married a second time; but I think there is a total absence of proof that this was done from any improper motive. If, indeed, there had been proof that she had permitted the testator to entertain hopes of himself marrying her, there might have been ground for suspecting that the concealment of the first [second ?] marriage had arisen from an interested motive; but the defendants, by some evidence that they have given, have displaced any such supposition, for they have proved a statement by her that she had refused proposals of marriage which the testator had made to her. The reason she assigned was not in all probability the true one; but the fact she states goes far not only to remove any suspicion of improper motives in the course she adopted, but to negative any idea that the testator's testamentary disposition in her favour was influenced by any expectation of her becoming his wife, or in the words of Lord Alvanley, that the assumed character was alone the motive of the bounty. It is obvious that the rule, that where the identity of the legatee is certain, the legacy will not be avoided by an inaccuracy in the description given to him, will be destroyed, if the Court permits itself to speculate without proof upon what may have been the object of the testator in giving the legacy. In *Standen v. Standen*, 2 Ves. Jun. 589, it was impossible to ascertain what the testator would have done if he had known that the legatee was illegitimate, or in *Schloss v. Stiebel*, 6 Sim 1, if he had foreseen that he should die before his marriage with the person he describes as his wife. The Court therefore must be satisfied that the assumed character was the motive for the bounty. That the testator was much attached to the legatee is evident from the provisions of the will; but that such attachment existed only upon the supposition that she was unmarried, or that his desire of benefiting her would have ceased if he had known of her being married, is not established. If she had been single and unmarried, and had so remained, she would have been entitled to the dividends without any limitation of time. Her interest would not have been determinable by her death, but only by her ceasing to be single and unmarried. This is different from a gift during widowhood. The state of widowhood must determine with the life of the widow, but the gift, so long as the legatee shall remain single and unmarried, must be considered as requiring the act of marriage to determine the interest. This gift therefore is of the dividends of stock without limitation of time, which carries the stock itself."

This judgment appears to us open to grave question. It does seem strange that what was given to the legatee "so long as she shall continue single and unmarried," she should be held entitled to

when she was not single and unmarried. There appear to be two errors in the judgment. Firstly, a test is applied which is not a proper test, and for regarding which as the test there is no authority; and because it satisfies that test, the legacy is thought to be safe. Secondly, there is a misconception as to the character really intended by the testator. As to the first point, the circumstances that a character has been falsely assumed, *and* that "it alone can be supposed the motive of the bounty," were in *Kennell v. Abbott* held sufficient to invalidate the bequest; but, as pointed out in our previous article on "The Effect of Divorce, etc., on Character of Legatee as Husband or Wife," it was not said by Lord Alvanley that the concurrence of both circumstances was necessary to invalidate the bequest. The true test we think is this, Is the character one but for the supposed possession of which the legacy would not have been granted? That the remaining single and unmarried was a character or condition of life but for which the legacy would not have been made, is evident from the circumstance appearing in the evidence founded upon by Lord Cottenham. Acting upon the principle of eliciting all facts which may enable the Court to put itself as far as possible in the position of the testator, evidence was allowed to be led that the testator had proposed to marry the lady, and that she had refused him. This, says Lord Cottenham, "goes far to negative any idea that the testator's testamentary disposition in her favour was influenced by any expectation of her becoming his wife." This may be; but it goes far to suggest a natural aversion for her becoming the wife of anybody else. Then it is said the provisions of the will show that the testator was much attached to the lady. No doubt he was much attached to her, and desired to benefit her, although she had refused to marry him,—so much attached to her that he disliked the idea of her marrying any other man, and made his bounty dependent upon her refraining from doing so. As to the other point, Lord Cottenham reads the words, "so long as she continues single and unmarried," as meaning a condition of life requiring the act of marriage to determine it, and as she was already married, the interest could not be determined during the existence of her marriage. This is not the natural meaning of the words. When we speak of a person continuing unmarried, we imply that the person is at present unmarried. Holding that the act of marriage was required to determine the interest, an act which, seeing she was already married, might never occur, Lord Cottenham, founding upon a technicality of English law, held that the gift was one not only of the dividends, but of the stock itself. We can hardly conceive a construction more repugnant to the evident intention of the testator. The testator believing her a widow, and unmarried, left a legacy of dividends which were to cease if she contracted a second marriage. Even if she had married after his death, he clearly intended she should thereupon cease to get the dividends.

But by marrying during his life, and allowing him to remain in the dark as to this fact, she, according to this construction, not only did not forfeit the dividends, but obtained the stock itself.

Sometimes a question arises whether the bequest is to an individual or to a character, that is to say, whether it is to a particular individual described by a character, or to whatever individual may hold the character. For example, does a legacy to a wife go alone to the wife existing at the date of the will, or does it go to a second wife married after the date of the will? In bequests by a husband to his wife this question cannot arise in England since the Wills Act, for the second marriage would revoke the will, but it may arise in the case of bequests by a testator to the wife of another person. In the cases in which the point has arisen, the decision of the question seems to have turned upon the construction of the terms of the particular will. In *Niblock v. Garrett*, 1 Russ. and M. 629, the testator described the wife as "my beloved" wife, and it was found that this applied only to the wife existing at the date of the will. In *Boreham v. Bignall*, 8 Hare 131, it was held that the first wife alone was meant; but the basis of decision was the construction put upon the clauses of the will. In the case of *In re Lyne's Trust*, L. R. 8, Eq. 65, a gift after a life interest to the testator's son, amongst the wife of the son in case she should survive him, and all and every the child and children of the son, was held to include a second wife, although there was a wife living at the date of the will who died before the testator. The gift was to any children of the testator as a class; the class could not be ascertained until the death of the son, and it was thought that the wife, the other recipients of this bounty, ought to be ascertained at the same time.

LORD HATHERLEY.¹

ONE of the latest contributions to legal biography is a life of Lord Hatherley, late Chancellor of England, and who died very recently. It is partly autobiographical, Lord Hatherley having in 1863 prepared materials as a contribution to Mr. Foss's *Judges of England*. The rest of the work is mainly composed of letters to his chosen friend, Dean Hook, with whom he seems to have corresponded upon a great variety of subjects. The work gives us perhaps a onesided view of Lord Hatherley's life and character,—in it he is rather the private gentleman, unbosoming doubts and anxieties to, and discussing theological points with, a kindred soul, than the eminent lawyer and public man. Legal readers may possibly feel disappointment—they will want to know more of the Chancellor, of the judgments which he pronounced, and the

¹ *A Memoir of the Right Hon. W. P. Wood, Baron Hatherley*. London: Richard Bentley & Son. 1883.

legislative work in which he engaged, and could dispense with his views of the Church and schismatics, of prayer and baptismal grace. At the same time, the biographer who had ignored or even slightly dealt with the theological element in Hatherley, would have made a great mistake. It has possibly received undue prominence, and some of the topics introduced upon which his views are given, such as the Gorham controversy, are stale and dreary in the extreme. But the striking fact about the man is this, that he passed a long career in Courts and Parliament, that he rose to the summit of a lawyer's ambition, and yet remained so spiritual and unworldly. The present Chancellor, one who had admirable opportunities of judging, said of him: "Lord Hatherley was a man who, I believe, from his earliest years lived a life of as much purity and as much diligence in doing his duty, in every grade of the profession and public stations which he was called upon to fill,—I think he had as much purity and simplicity of character, as much thorough conscientiousness, as much energy and as sound judgment as, taking into account the infirmity of man, any of us could hope to attain to." These are not the words of mere conventional compliment.

William Page Wood, born in London in 1801, was the son of Matthew Wood, a successful merchant, perhaps best known as Alderman Wood, the friend and supporter of the unfortunate Queen Caroline. Young Wood's school days were spent, first at a private school kept by a Scotch divine in London, and subsequently at Winchester. At this latter place the future Chancellor seems to have been one of the ringleaders in a somewhat serious insurrection, when the military were called in, who easily succeeded in routing the boyish rebels. This event terminated his Winchester career, and he then proceeded to study at Geneva, which at that time was popular with British parents, winding up with Trinity College, Cambridge. Amongst his early recollections he mentions visits paid as a lad to the Old Bailey when his father went thither in a municipal capacity. The alderman had destined this son for the legal profession, and probably sought to encourage an interest in courts of justice. But while the trials attracted him, he was, he tells us, "very early shocked at the course of Old Bailey procedure." At that time capital offences were "almost the rule," and it was the custom to close the session by condemning in a batch those who had been capitally convicted in the course of it. "I once," he says, "saw thirty or forty so condemned, some of whom were making grimaces at the judge, while others, who expected to be left for execution, were deeply distressed." The conversation of the chaplain or ordinary resembled that of the parson in *Jonathan Wild*. "On one occasion," he relates, "I heard a poor young fellow of seventeen tried for forgery, who was afterwards executed with five other criminals, not one of whom had committed any crime attended with violence, and not one of whom had attained

the age of twenty-four." Such was the chief criminal court of England when George III. was king. In rather an odd way did young Wood hear the debate in the celebrated case of Thornton argued before Lord Ellenborough, which raised the question of the right to the wager of battle. There was a great crowd, and he managed to get a place in court by acting as the clerk, and carrying the books of one of the junior counsel,—Wilde,—destined like himself for the Woolsack. Upon the subject of the Queen's trial he naturally expresses a strong opinion. "Never," he says, "was any trial against the meanest prisoner so shamefully conducted." He had himself returned to England, after his course of foreign education, in her suite, and he subsequently went to Italy along with Chevalier Varselli to assist in collecting evidence for the defence. The opinion which he then formed of her case he expresses in her autobiography, written after he had become a judge of eminence and experience. "Both," he says, "from the evidence I obtained in Italy (which could not be made available) as well as from the evidence actually given in the House of Lords on the celebrated Bill of Pains and Penalties, and also from my own observation of Queen Caroline, with whom, on my journey to England and afterwards, I had many interviews, I was satisfied of her innocence of the crimes laid to her charge."

After leaving Cambridge in 1824, Wood was placed in the chambers of an equity leader, and entered at Lincoln's Inn. Two of the Queen's counsel, Henry Brougham and Thomas Denman, signed the formal recommendation required by the rules of the Inn. He was called to the Bar in 1827, and speedily got into business as a conveyancer and equity draftsman. When he entered upon the work of his profession, a new and most important field was being opened up to barristers; "a wholly new business," he says, "had arisen consequent on the passing of the Liverpool and Manchester Railway Bill in 1827. The parliamentary Bar was then a comparatively small body. Those indeed who confined themselves to practising before one or other of the two branches of the Legislature might be said to be only two or three." With his Chancery business he soon combined an extensive parliamentary practice. "The changes," he tells us, "which I personally witnessed in public opinion on the subject of railways were remarkable. At first the landowners opposed every line which passed through their property; within six years they objected to every line which did not pass through their property. In 1828, I was counsel for a company who proposed to make a line from London to Blackwall. The project was scouted as ridiculous, and unceremoniously rejected. In 1836, I was again counsel for a similar line against two competing lines, the only doubt being which of the three would pass." But while largely engaged in parliamentary practice, he combined this with business at the Chancery Bar,—the latter was compatible with a seat in the House, to which he aspired, and which

he obtained, for the City of Oxford, in 1847. In 1851, under the Ministry of Lord John Russell, he became Solicitor-General, and took his share in the work of law reform, aiming in the direction of improvements in the Court of Chancery, with which he was naturally well qualified to deal. The Bills which he introduced relating to this tribunal were carried into law under the succeeding Government. The procedure in Chancery was improved, the office of Master abolished, and the three Vice-Chancellors with their clerks enabled to do, and to do more speedily, the work formerly performed by the Masters. Although a devoted son of the Church of England,—as abundantly appears from these volumes,—he exhibited as a legislator not a little independence. Thus he favoured the admission of Jews into Parliament, he passed the Act which extended the privilege of an affirmation to scrupulous souls, while as Chancellor he warmly supported the Irish Church Bill.

In 1852, Lord Aberdeen succeeded Lord John. From the new premier Wood received the offer of a Vice-Chancellorship, which, with the approval of Lord John, he accepted. Writing in 1863, he mentions that, during the period of eleven years which had elapsed since he went upon the Bench, he had only on one occasion written his judgment. He objected to written judgments, both as injurious to his health and likely to cause delay to the suitors. The style of his judgments brought down upon him some adverse criticism from the Chancellor John Campbell. The incident is worth recording. Vice-Chancellor Wood had in a certain case made what we should in Scotland call an interim decree. This the Chancellor, upon appeal, affirmed in every respect, but in his remarks he expressed the opinion that he would have disposed of the appeal more satisfactorily had the judgment appealed against been more condensed, and complained that his attention had been diverted from the main question by minute disquisitions upon subordinate points. He suggested that judgments of this sort had a tendency to unsettle the law and generate appeals, observing that "the verdicts of juries are generally acquiesced in, because they are given without reasons." He concluded with a suggestion in favour of written judgments. This "lecture," as Lord Hatherley's biographer calls it, created some stir in legal circles, and led to a protest being sent to its author by the Master of the Rolls and two of the Vice-Chancellors. "This is," they said, "the first occasion in which any judge has commented on the manner adopted by any other judge in delivering his judgment, as apart and distinct from the value of the reasoning and the conclusions to be found in the judgment delivered." They were afraid of alarming consequences in the shape of diminished respect for the Bench. The Chancellor defended himself in his answer to the protest, maintaining that it "belongs to the appellate judge to comment freely on the judgment he has to review and the manner in which it has been given," and that this right had been often exercised. "I should not like," he

remarked, "to repeat the observation which I have heard from Lord Eldon upon some of the judgments of the Court of Session in Scotland." Probably the reporters have felt a similar delicacy, or otherwise our reports from the House of Lords during the Eldon period might have been more lively reading.

Vice-Chancellor Wood was popular as a judge; eminent counsel elected to practise before him, and appeals from his decisions were rare. *The Solicitors' Journal* remarked in 1865, he is one "on whose judgments there is undoubtedly placed an amount of reliance unshared by any other living judge." He was patient with the Bar. A friend one day remarking upon the tediousness of the speech of a certain junior, "True," the Vice-Chancellor replied, "it was wearisome, for he assumed that I was ignorant of the A B C of the law; but I recollected how I was once snubbed by Leach when I was a junior, and I resolved to hear him out." His rule was not to look at the papers in a case previous to debate, lest he should form a prejudice before hearing both sides.

In 1868 he was appointed to the post of a Lord Justice by Lord Cairns, the vacancy being caused by the latter's recent elevation to the Woolsack. But a similar promotion now awaited Wood himself. The Tory Government went speedily out of office, and Mr. Gladstone came into power pledged to disestablish the Irish Church. He carried the nation with him, but he failed to carry Sir Roundell Palmer. His scruples were sufficient to exclude him from the Cabinet, and in this way the Chancellorship was offered to Lord Justice Wood. It is singular that upon this subject of the Irish Establishment two such men as Lords Hatherley and Selborne should have differed, and that the conscientious objections of the one should have led to the promotion of the other. For they belonged not only to the same Church, but were essentially of the same school of theology in that much divided communion. Yet no one will for a moment suspect Hatherley of having sacrificed conscience to ambition. He seems to have been in reality as unwilling to take office as any bishop is in theory. He could easily establish his consistency. In fact, the views now in the ascendancy had been maintained by him twenty years previously, when in the House of Commons he had supported a motion for a Committee on the Irish Church.

"He was called," said Lord Selborne in the House of Lords, "to the great office of Lord Chancellor, and he carried himself so meekly in the discharge of his public duties, so diligently and so zealously supported every measure which, according to his judgment, was for the benefit of the country and for the advancement of liberty and justice, that when from failing health, or rather failing eyesight, after four years sitting in this place, and presiding over your lordships' deliberations, he was compelled to relinquish that office, he carried with him into private life as large a share of esteem and respect as ever fell to the lot of any predecessor of his

in that exalted position, as large as any who may be called upon hereafter to succeed him can possibly hope to attain."

Lord Hatherley's life, after his retirement from public duties, was prolonged for a period of nine years. In 1877 he was compelled by increasing infirmities to resign duties which he had loved to perform since the days when he was a rising young barrister—those of a Sunday-school teacher in his parish church at Westminster. In the letter which contained his resignation, referring to himself and his wife he says, "Upwards of forty years have passed since we commenced our work there, and our first pupils have in some cases seen their children pass through our hands, and probably their grandchildren are nearly ready to follow them. It is better that these should be instructed by a younger generation of teachers." There have been more learned lawyers, more eminent statesmen and eloquent orators than Hatherley, nevertheless many will concur in the opinion of Earl Cairns, who has said "that as a judge, as a Christian, as a gentleman, and as a man, this country has not seen, and probably will not see, any one who is his superior."

REFORMATORY AND INDUSTRIAL SCHOOLS.

THE TWENTY-SIXTH REPORT OF THE INSPECTOR OF REFORMATORIES AND INDUSTRIAL SCHOOLS FOR 1882.

THIS interesting report by Major Inglis, the Government Inspector, bears date May 1883, but it was not distributed until the month of September last. Though containing many important facts and suggestions, it has as yet been little known. To every philanthropist who feels interest as to juvenile delinquency, and the best modes of checking its spread, this volume is deeply interesting.

The total number of schools under Government inspection (p. 5) is 61 reformatory schools and 150 industrial schools, of which last number 6 are specially certified as "truant schools" and 12 as "day industrial schools." The total number in detention in reformatory and industrial schools at the close of 1882 was 24,215, of whom 19,528 were boys and 4687 girls, being an increase over 1881 of 522. In England (p. 17) there are 29 reformatories for Protestant boys and 13 for girls, and 4 reformatories for Roman Catholic boys and 3 for girls; in Scotland there are 7 for Protestant boys and 3 for girls, and 1 reformatory for Roman Catholic boys and another for girls of the same denomination.

In 1882 there were admitted under the Reformatory Act in England (p. 18) 1188 boys and 238 girls, and in Scotland 224 boys and 24 girls—or in all, 1412 boys and 262 girls. Under the four

sections (14, 15, 16, and 17) of the Industrial Schools Act in 1882 there were admitted in England 1957 boys and 431 girls, and in Scotland 756 boys and 182 girls; but under section 17 of the Act only 12 boys and 2 girls were admitted in England, but in Scotland not one of either sex was admitted under that section. Under the Elementary Education Act, under sub-section 1, 424 boys and 39 girls were admitted in England, and under the 2nd sub-section 771 boys were admitted and 78 girls; whilst in Scotland, under sub-section 1, none were admitted, and only 1 boy and 1 girl were admitted under sub-section 2. The reporter remarks on these striking discrepancies—"It will be seen that in proportion to the population (7 to 1) Scotland makes much more use of the Industrial Schools Act than England." This fact is one which requires inquiry, as also in both countries the great increased proportion of boys to girls in admission in 1882.

Of the number under warrants of detention in reformatories on 31st December 1882 (p. 17), in England there were of Protestants 3412 boys and 731 girls, and of Roman Catholics 1021 boys and 239 girls. In Scotland there were of Protestants 758 boys and 100 girls, and of Roman Catholics 263 boys and 77 girls—making the total 5454 boys and 1147 girls. This, however, includes a large number of boys and girls on licence as well of those who had "absconded" or "were in prison." When contrasted with the previous year, the numbers show a decrease of 92 boys and 54 girls.

The numbers in detention (p. 26) in industrial schools on 31st December 1882, were in England in Protestant schools 8523 boys and 1612 girls, and of Roman Catholics 2137 boys and 629 girls. In Scotland the number of Protestant boys was 3005 and of girls 1037, and of Roman Catholics 409 boys and 262 girls. These numbers include children on licence, and those "absconded and not recovered." The admissions contrasted with those of the previous year give an increase of 390.

Two tables (pp. 7 and 8) show from 1859 to 1882 the growth of the Reformatory and Industrial School Acts in Great Britain under the following heads, which we will state into decennial periods :—

INMATES.

<i>Reformatory Schools.</i>				<i>Industrial Schools.</i>			
1859,	.	.	3,276	1864,	.	.	1,668
1869,	.	.	5,480	1874,	.	.	11,409
1879,	.	.	5,975	1882,	.	.	17,614
1882,	.	.	6,601				

TOTAL SCHOOL EXPENDITURE FOR THE YEARS

1859,	.	.	£72,893	1866,	.	.	£58,701
1869,	.	.	118,418	1875,	.	.	292,170
1879,	.	.	138,183	1882,	.	.	338,200
1882,	.	.	134,204				

SUMS PAID BY THE TREASURY.

1859, . . .	£51,681	1864, . . .	£15,887
1869, . . .	82,357	1874, . . .	34,333
1879, . . .	91,429	1882, . . .	170,472
1882, . . .	87,241		

SUMS PAID BY PARENTS.

1859, . . .	£1,603	1864, . . .	£1,188
1869, . . .	3,240	1874, . . .	9,093
1879, . . .	6,316	1882, . . .	16,993
1882, . . .	5,918		

- SUMS PAID BY RATES.

1859, . . .	£2,601	1864, . . .	Nil.
1869, . . .	18,041	1874, . . .	£20,651
1879, . . .	25,357	1882, . . .	42,726
1882, . . .	23,710		

SUBSCRIPTIONS AND LEGACIES.

1859, . . .	£16,868	1864, . . .	Nil.
1869, . . .	7,730	1874, . . .	£48,607
1879, . . .	5,000		
1882, . . .	5,956		

For industrial schools, the sum received from School Boards, commencing in 1871, was £2982, which in 1882 had been increased to £59,583.

The tables as given in the report have parts of pounds, but which we omit. These two tables we print in such a manner as affords ready means of contrast. There are some startling circumstances brought out by these tables. The reformatory table is carried back to 1859, that for industrial schools commences in 1864. It is curious and important to learn from the figures the rise in numbers of inmates and the increase of expenditure with the various sources of revenue. It is noticeable that whilst in the table applicable to reformatories one column is headed "parent," in that applicable to industrial schools it assumes the plural "parents." We are not aware of any change of liability of parentage between the two institutions. Another noticeable divergence between the tables is that a sum is derived in support of industrial schools solely from "subscriptions." This source is amended in the tables for reformatories into "subscriptions and legacies." We rather think that the reverse is the fact, and that with reformatories, being mainly supported by Government, less call is made for voluntary help. The sums in support of both institutions under the heading of "rates" requires explanation, seeing that we are not aware that any general rate is levied on the country for the special support of schools of either kind. The sums derived from "School Board" (Boards is meant), which appears for the first time in 1871, and amounts from the first to a very large sum—£59,583—ought to have been accompanied with some explanation.

There is an omission in these tables which is very remarkable. Whilst notice is taken of all the branches of expenditure and all the sources of revenue or increase, no mention is made, either under the head of reformatories or industrial schools, of the work or labour performed in these institutions. This information, however, is fortunately supplied in other portions of the report, though it is not easy to account for its omission in the proper place, and which may lead to an erroneous conclusion. We find on p. 23 of the report an account of the receipts and expenditure for reformatory schools for the year 1882, where an item is stated as "Profit on Industrial Departments, including hire of labour (£3101, 3s. 3d.), the sum of £14,337, 3s. 3d." On p. 30 of the report the receipts and expenditure of industrial schools are also given, and there also is an item, "Profits from Industrial Departments, including hire of labour (£5232, 8s. 8d.), £23,857, 0s. 1d." There is much which requires explanation in these statements. The great excess in favour of industrial schools over reformatories is very marked, and the including of "hire of labour" in both should be explained. Considering the advanced age of the inmates of reformatories, and the stricter rules therein, the opposite results might have been reasonably expected.

The report contains many important and suggestive facts which require consideration. On p. 24 it is stated, "The average cost of maintenance, including rent and expenses on, and the usual set-off for the profits of the labour of the inmates," was in England, for boys' reformatories, £20, 3s. 3d., and in Scotland, £18, 15s. 4d.; for girls' reformatories in England, £21, 4s. 3d., and in Scotland, £20, 14s. 4d. Similar results are to be found with regard to industrial schools. In England, in five mixed schools, the cost was £15, 7s. 3d.; in Scotland, on eight schools, £13, 12s. 10d. In England, 59 schools for boys only, £19, 2s. 2d. In Scotland, on 12 schools, £14, 2s. 7d. In England, on 31 schools for girls only, £18, 14s. 5d.; and in Scotland, on 10 schools, £12, 19s. 9d.

This remarkable and uniform discrepancy must arise either from the inmates of reformatories and industrial schools in Scotland being underfed or fed at less expense (oatmeal being the national staff of life), or that their industrial powers and profits were in a higher grade. One item (p. 31), under the expenditure of industrial schools in Great Britain, is matter which demands attention. Another startling item occurs—for the year 1882 there appears no less a sum than £4560, 8s. 11d. for "medical expenses" in industrial schools. This would imply some defect in the sanitary condition of the buildings, and the unhealthy state of their inmates. Under the account for reformatories there appears £1906 not under the term "medical expenses," but under that of "medical," which may include the dispenser as well as the cost of the drugs dispensed.

A number of important tables are given, such as the ages of

those admitted to reformatories and industrial schools. As to the former 579 and 226 were never convicted; 423 boys and 36 girls had previously been once convicted; 142 boys and 8 girls had been twice convicted; 48 boys and 1 girl had received three previous convictions; and 23 boys and 1 girl had been convicted "four times and upwards." "The family circumstances" of those sent to industrial schools are given (p. 27), and from which very important results may be fairly deduced. Of "illegitimates" there were 145 boys and 59 girls; "both parents dead," there were 161 boys and 30 girls; "father dead," 906 boys and 205 girls; "mother dead," 564 boys and 130 girls; "deserted by both parents," 154 boys and 42 girls; "one or more parents destitute or criminal," 38 boys and 20 girls. The most melancholy item, and by far the largest of the series, is "both parents alive and able to take care of their children," 1941 boys and 245 girls, or a total of children neglected by their parents able but neglecting to bring up their children, and who ought to be compelled by law to perform their parental duty. This is frequently an objection urged against industrial schools. The answer is, are the children to be sacrificed to the offence of the parents, and another generation be added to the offenders of the past age?

The table (p. 19) gives the discharges from reformatory schools in 1882, being 1478 boys and 332 girls—in all 1810, and thus details their disposal:—

	Boys.	Girls.	Total.
To employment or service, . . .	550	198	748
Placed out through relatives, . . .	536	97	633
Emigrated, . . .	82	7	89
Sent to sea, . . .	209	...	209
Enlisted, . . .	32	...	32
Discharged from disease, . . .	17	10	27
Discharged as incorrigible, . . .	5	2	7
Died, . . .	27	11	38
Absconded, not recovered, . . .	20	7	27

Another table (p. 27) gives the same disposal of discharges from industrial schools in 1882, in the same classification:—

	Boys.	Girls.	Total.
To employment or service, . . .	1084	390	1474
Placed out through friends, . . .	1342	183	1525
Emigrated, . . .	79	13	92
Sent to sea, . . .	523	...	523
Enlisted, . . .	130	...	130
Discharged as diseased, . . .	54	13	67
Committed to reformatories, . . .	49	3	52
Died, . . .	58	27	85
Absconded, not recovered, . . .	41	4	45

The more important of the tables in this volume are those showing the conduct and character of the discharged inmates of the reformatories and industrial schools. The former are given at p. 30 of the volume, and purport to give the results of discharges for

the years ending 1879, 1880, and 1881, being 3666 boys and 814 girls. The results of discharges from industrial schools are given on p. 28, being for the same three years, and may be contrasted. The discharges in these years, deducting those since dead, were 7068 boys and 1580 girls. The following are the two tables contrasted:—

REFORMATORIES.					
	Boys.			Girls.	
Were doing well, .	2728,	or about 76 per cent.		551,	or about 69 per cent.
Doubtful, .	83	„	3 „	78	„ 9 „
Had been convicted					
or recommitted, .	528	„	14 „	66	„ 8 „
Were unknown, .	242	„	7 „	110	„ 14 „

INDUSTRIAL SCHOOLS.					
	Boys.			Girls.	
Were doing well, .	5624,	or about 80 per cent.		1247,	or about 79 per cent.
Doubtful, .	284	„	4 „	118	„ 7 „
Had been convicted					
or recommitted, .	355	„	5 „	27	„ 2 „
Were unknown, .	803	„	11 „	138	„ 12 „

Assuming that the results have been accurately ascertained (which cannot be an easy task over so wide a field), they must be very satisfactory indeed, and can afford a very large margin for mistakes.

The statistics already given may suffice to satisfy the public as to the present state of reformatories and industrial schools; some remarks and suggestions by the inspector throughout the volume may now be given.

The inspector states that “schools for the reception of educational cases show a tendency to increase, though slowly. Few Boards having yet availed themselves of their powers to establish schools of this class, may be attributed to the fact that truant and day industrial schools have only been in existence for a few years, and may be said to be still on their trial. But the results hitherto have been encouraging” (p. 9).

The reporter truly states “that there can be no difference of opinion on one point—the schools have done and are doing good work.” “But care should be taken that the schools are not flooded with children whose cases can be dealt with without a lengthened removal from their homes.” In the reporter’s opinion, it is in “the industrial rather than in reformatories that alteration seems desirable.” “Very young children ought not to be sent to reformatories, except in special cases, to be at once reported to the Home Office.” “With regard to industrial schools, there is some danger of their being overdone. While, on the one hand, it is not desirable to have children at large whose conduct or surroundings point to a probability of their eventually becoming criminals, care should be taken, on the other, that such children alone be sent to industrial schools, and parents and Poor-Law Boards not unnecessarily

relieved from their obligations and responsibilities. Day industrial schools might, with great advantage to the country, be greatly increased in numbers, and placed under the Education Department; and one or more industrial schools might with advantage form part of the machinery of every large School Board" (p. 10). As to incorrigible juveniles, the inspector is against a discharge, as "just what the boy wants, and is therefore a premium on his bad conduct." "Transfer to another school is not always advisable," and seldom does a transfer effect a change for the better, and the "transferred boy does as much harm in the second school as in the first, and becomes a ringleader in every mischief." The inspector recommends "one or more small penal reformatories, to which incorrigibles could be committed at the request of managers, and where they could be retained until they showed signs of amendment." "One school for 50 boys, and one for even a smaller number of girls, would probably meet the requirements of the case" (p. 11). The inspector justly complains of a rule applicable to admission to the Royal Navy. A boy will not be admitted if he cannot declare he was not in jail or in a reformatory. "Were it not for this rule, I am sure (says the reporter) many eligible and well-conducted boys would gladly offer themselves for the service, and would, I have no doubt, do as well there as many of our reformatory boys are now doing in the army, where they are accepted without hesitation." "The law as it now stands gives the worst of parents the right to claim their children on discharge, and in too many cases the labour of years is thus thrown away, and the child returns home to fall under the old influences, from which it had been found necessary to remove him in his earlier days." The inspector argues for "additional powers to the managers to retain some directing influence over the children after discharge." "This," he says, "appears more strongly in the cases of girls than of boys." "Stress is laid by some of the opponents of the present system of industrial training on the fact that in many cases boys do not follow, after discharge, the trades they learned in our schools." "The boy on discharge must work for his living, and on leaving our schools work is no new thing to him, although the description of work be new." The inspector refers generally as to the state of education and conduct of the juveniles, and as to truant schools and day industrial schools. As to the latter some points are suggested as to their proper management. In the day industrial schools in 1882 there were 1693 children under "orders of attendance" (the sexes are not distinguished). The cost was £13,494, to which the Treasury contributed £2592, the Local Authority £5890, and the parents £2183. The average cost per head in England was £13, 8s. 1d., and in Scotland, £10, 12s. 8d.

NESTOR

THE COURT OF SESSION IN 1819 AND 1820.

BY A PARLIAMENT HOUSE CLERK OF THE PERIOD.

ARTICLE FOURTH.

AT this period the Court of *Admiralty* had an extensive business, and was very popular. Mr. Wolfe Murray (afterwards Lord Cringletie) was the judge of Admiralty, and then acquired the character which he continued to sustain as a most painstaking judge, and who expressed the reasons of his decisions in lengthy notes, which before then had never been done by any judge. The Admiralty Court was not limited to cases of navigation. It was held that all commercial cases of ordinary debts fairly fell within its jurisdiction. Thus having no limit as to amount, its territory being as extensive as that of the Court of Session, and its sessions being longer, its business was great. The Admiralty summons had the peculiarity of being almost a blank. It was sufficient when first issued that it only set forth the name of the pursuer and defenders, with the amount claimed. When called in Court, the grounds of action were set forth in the blank space left for that purpose. The robes of the judge were surprising, forming a composite of the naval and juridical, which gave the Judge-Admiral the appearance of a merry-andrew or buffoon.

An advocate at this time, under the old municipal system, was made a town councillor, which excited no small astonishment. He was made convener of the *Cleansing* Committee, which his brethren of the Parliament House transformed into convener of the *Fulzie* Committee, under which cognomen he was uniformly recognised.

A highly respectable gentleman of the name of Chapman taught elocution to the students of Glasgow College, and published several books on oratory. He maintained that the occupants of the pulpit and the forensic bar were much deficient in their mode of pronunciation, and were wholly regardless of longs and shorts in their elocution. He had his son educated for the supreme bar in his father's principle: the young man, however, was deficient in other more important requisites for success, and his oral peculiarities rendered him somewhat ridiculous. He soon left the Court, but fortunately for himself he was a great proficient on the violin, and for many years the young barrister formed one of the orchestra at the Edinburgh Theatre Royal, and no challenge was made of this great change of his profession and practice.

Two of the same surname were well known at the bar—Duncan M'Neil (afterwards Lord Colonsay) and Alexander M'Neil, generally known as Sandy M'Neil. The last-named was a native of Glasgow, and commanded a large practice from that quarter. He was regular in his attendance at the Glasgow Circuit, and the young

writers on these occasions invited him to dinner, and discussed the cases in which he was engaged. He married a county lady, and afterwards he essayed the English bar, but after a brief time returned to the Parliament House, but never recovered the large business he once enjoyed.

It was said that ministers' sons had the privilege of being pages to the Lord High Commissioner at the times of Assembly, which so far helped the means of their education. An advocate, who was noted for his stiff and erect posture and gait, was said for some years to have formed part of the annual pageant in May, and was known as *the Page*. At this time political party spirit was rampant; the Tories started a newspaper to compete with the *Scotsman*, under the title of *The Beacon*, having a lighthouse as its crest. Here the Reformers were often noticed with bad taste, and the Page and other nicknames were freely given. In its accounts of processions and public meetings in support of Parliamentary reform, *the Page* was never omitted.

NESTOR.

Reviews.

Legal Medicine. By CHARLES MEYMOTT TIDEY, M.B., F.C.S. Part II.
London: Smith, Elder, & Co. 1883.

THIS is the second part of a work which we noticed last year. It displays the same exhaustive treatment of the subject, and will probably take rank as one of the leading books on medical jurisprudence. This volume embraces a class of subject, the study of which is extremely interesting to medico-legal experts, and which often exercise an important influence on the rights of the individual; the general public, however, may be thankful that it is not a part of a polite education to be master of some of them. The matters treated of in this volume are legitimacy and paternity, pregnancy, abortion, rape, various unnatural crimes, live birth, infanticide, asphyxia, drowning, hanging, strangulation, and suffocation. All these subjects are taken up in detail, the principal points in each being treated in separate paragraphs. Short reports of illustrative cases are given at the end of each chapter, with the reference appended. The work is one which testifies to an amount of laborious research on the part of the learned author, which is in the highest degree praiseworthy. The cases which appear are in fact only a selection from those which he has collected, as we are told in the preface that upwards of eight hundred cases have been omitted from want of room. We cannot, of course, pretend to criticise this book from a medical standpoint, nor express an opinion on the correctness of the views expressed, but, after having considered almost all the works on medical jurisprudence which

have been published for a good many years, we may safely say that the present author's will stand comparison with any of them as regards the amount of information given, while it excels them all as regards the number of illustrative cases quoted. It is a thoroughly practical and useful book, and cannot fail to be of the highest service both to the medical and legal practitioner.

We observe that a third part is in preparation, in which the subject of mineral poisons will be discussed.

Latin Maxims and Phrases: Collected from the Institutional Writers on the Law of Scotland, and other Sources. With Translations and Illustrations. By JOHN TRAYNER, Advocate. Third Edition. Edinburgh: William Green. 1883.

THE appearance of a new edition of this work within seven years is a sufficient proof in itself that it supplies a want. We noticed the book with favour on the publication of the last edition, and we see no reason to alter our opinion now. On the contrary, the book has been improved both by omissions and additions. Sundry trifling phrases, the meaning of which every person having any pretension to education is presumed to know, have been eliminated, and a good deal of information has been added which brings the state of the law down to date. The changes made by recent statutes, such as the Presumption of Life (Scotland) Act, the Employers' Liability Act, and the Married Women's Property (Scotland) Acts, are all clearly recorded under the headings of appropriate maxims. It would, however, have been better had the author given the name of these Acts in full, instead of merely referring to their number in the statute-book. The book is an admirable one to place in the hands of the students of Scots law; although not so philosophical as Mr. Broom's well-known English work, it is more suited for practical use, and is the kind of volume to be kept on a convenient shelf, so as to be ready to consult at all times.

The printing and general "get up" of the book leave nothing to be desired.

Registration of County and Burgh Voters: A Digest of Appeal Cases decided in the Court of Session from the Year 1868 to 1882. By WILLIAM CAMPBELL, Assessor of Glasgow. Edinburgh: William Green. 1883.

THIS is a little volume which we have no doubt will prove useful both to lawyers and assessors. By way of preface to the digest of decisions, there is a short account of the various franchises conferred by the Reform and Municipal Election Acts, arranged under the heads of County and Burgh voters. The process of registration

is also briefly explained. Finally, there is a "Registration of Voters' Calendar," containing under the proper day and month fixed by statute the various steps which it is necessary for sheriffs, sheriff-clerks, and assessors to take. All the headings, both in the introductory portion of the book and in the digest itself, are printed in a bold type so as easily to catch the eye.

As to the Digest, it consists, so far as we have been able to test it, simply of the rubrics from the *Jurist* and Mr. Rettie's reports. Any alterations are very slight. "*Diss. Lord Ormidale*," *e.g.*, may appear as "Lord Ormidale dissenting." It is to be regretted that the references, prior to the date at which Mr. Rettie's series of reports began, are solely to the *Scottish Jurist*. Mr. Campbell has doubtless acted wisely in abiding by the rubrics, which are the work of learned lawyers, and carefully considered. He might, however, have acknowledged the source from which his materials are derived.

The Month.

Can a Partnership be liquidated under the Cessio Acts?—This question was asked last month by a correspondent, who stated that considerable uncertainty existed in the minds of Sheriff Court practitioners on the subject, and that the practice was to treat the Cessio Acts as inapplicable to partnerships.

We cannot participate in our correspondent's doubts. We think the mode of liquidation introduced by the Debtors Act, 1880, is quite applicable to partnerships, and in the case of petty estates will be very expedient.

The question depends on the construction of the 7th and 8th sections of the Debtors Act. Now, according to the phraseology of these sections, a petition for cessio may be presented by or against "any debtor who is notour bankrupt within the meaning of the Bankruptcy (Scotland) Act, 1856, or of this Act." Now a partnership is, in our view, plainly such a debtor. It may be made notour bankrupt either by diligence against one of its partners, under section 6 of the Debtors Act, or by diligence against its estate under sections 7 and 8 of the Bankruptcy Act (see *Black v. Watson*, 1881, 9 Ret. 167). No doubt the Debtors Act does not contain an interpretation clause, but ordinary analogy would seem to be a sufficient ground for including partnerships under the term "debtor," even apart from the apparent reference to the meaning of the word "debtor" in the Bankruptcy Act. It may be observed that under the Act 1696, cap. 5, which first introduced the status of notour bankruptcy, and which required personal diligence for its constitution, ordinary partnerships were included,

on the ground that they might be imprisoned in the persons of their partners.

The form of *cessio* introduced by recent legislation is a widely different process from the *cessio* of the common law and the Acts of 1836 and 1876. The old form of *cessio* was mainly intended for relieving unfortunate debtors from diligence against their persons, and could only be awarded where imprisonment was threatened. The modern form of *cessio* is truly a process of *concourse*, and is intended to be a cheap and speedy mode of distributing bankrupt estates. There seems no good reason for excluding partnerships from the benefit of such a process, and it is thought that there is nothing in the language of the statutes that should lead to this result.

County Court Judges and their Libraries.—Our readers are well aware of the very favourable position which the English County Court judges occupy as compared with their brethren the Sheriff-Substitutes in Scotland. But the following fact, which we state upon excellent authority, may be new to them. A County Court judge is, it appears, supplied with the Law Reports and legal works at the expense of the public Treasury.

Sheriff-Substitutes have hitherto been under the impression that they must furnish their own tools. We suggest that some one of their number should raise the question by an application to the Lords of the Treasury. We give him, however, no hope of a favourable reply.

The Twins Problem.—A Kentucky gentleman, on his death-bed, made a will, in which he bequeathed to his wife, who was *enceinte*, in case she should be delivered of a daughter, one-half of his estate, the other half to such daughter; but in case the expected heir was a son, one-third was to go to the wife and two-thirds to such son. Shortly after the testator's death the wife gave birth to twins—a boy and a girl. The question now puzzling the lawyers is: How shall the estate be divided? The wife claims one-half the estate because she had a daughter; the daughter's guardian claims one-half the estate under the will; and the guardian of the son vows he will not accept less than two-thirds of the estate. The matter is now pending in the Hickman Circuit Court. While the judge is trying to solve this question, the lay members of the profession are trying their "prentice 'han'." One attorney in New York city thinks it a case of "lapse;" that the "testator" died intestate, and that the law must make his will. Another, writing from Frankfort, Ky., says: "My solution of the question is, to construe the will as devising to the mother five-twelfths of the estate, to the daughter three-twelfths, and to the son four-twelfths; that is, one moiety to the mother and daughter in the proportion of one-half to each; and the other moiety to the mother and son in the proportion of one-

third to the mother and two-thirds to the son." And a Hoboken attorney comes to the same conclusion. He says that he "simply bequeathed his estate twice. If he left a daughter, he gave half to the widow and half to the daughter. If he left a son, he gave one-third to the widow and two-thirds to the son. So, each legacy abated fifty per cent. The widow took five-twelfths, the daughter one-fourth, and the son one-third." From Cincinnati and Toledo comes another solution, viz., "Is not the following a more equitable division all round: One-fourth to the wife, one-fourth to the daughter, one-half to the son? This carries out the testator's intention to make the wife and daughter share equally, and son receive twice as much as the wife. He did not devise the estate twice, but only once upon contingencies—the ultimate events fulfilled neither contingency alone, but partook of each."—*Ohio Law Journal*.

The Endless Reports.—A correspondent writes to the *Albany Law Journal* on this subject as follows:—It is impossible to say how many reports, in volumes varying from 500 to 800 pages, are printed annually in the United States. In this State there are over fifty volumes each year, let alone a continual outpouring of digests, text-books, glossaries, etc. Each volume is more voluminous than the last. Cases are first brought out in a daily, repeated in a weekly, a monthly, and lastly in an annual digestive form. We adopt a new code, and the old practice decisions are necessarily out of joint with it. A new series of practice decisions not affecting the merits of a question are produced; endless reports, endless litigation, the (pleasant at least to lawyers) consequence.

But there is, it seems, also a great tendency now-a-days to prolixity in rendering decisions. A vast quantity of superfluous matter is apt to be introduced in opinions of judges which is worse than worthless. With all due respect to the bench, the matter of their decisions on appeal is seldom sifted and sufficiently condensed. The rule is sound, that good condensation requires extra labour. Take the average New York Court Appeal Report, what lack of any attempt at condensation! Not only in the reportorial *résumé* of facts on which the case rests, but in the opinions. And oftentimes what loftly elaboration of legal commonplaces, what absurdities! To show that our position is not altogether far-fetched, we select, purely at random, sentences from opinions in late reports, *e.g.*: "Did not the dead man have enough of advantage when he was allowed to reach out from his grave, and put into the middle of this trial his declaration in writing that he owned these bonds?" (85 N. Y. 641). Again, "Who was Ver S. Moore? If Ver is to be held not to be a name but an abbreviation of some name, of what name? Is it the abbreviation of a man or of a woman? It might be the abbrevia-

tion (*sic*) of Verplank, Vergil, Verrius, Virginus, or of other names which could be mentioned. The inference is that Ver S. Moore was a man," etc. Again, *ib.*, we are informed that "for several centuries, by common law, among all English-speaking people, a woman upon her marriage takes her husband's name" (85 N. Y. 449). But the inference is wrong, for "Ver S. Moore" is a southern lady, afterward, we are informed in the opinion, the wife of a clergyman. Another instance: "By this time the customer had gone, but Carter, with a *reckless confidence* in the strength of the boiler, sent two men to the shop for additional weights, and before their return, took hold of the lever, *first with one hand, then with both*, holding it down. On the instant the explosion occurred, scattering *death and injury around*" (*Ib.* 221). The italics are ours. Of what use is this graphic description? Why are we lacerated with the tale of the rash Mr. Carter, who was too inquisitive about a miserable steam boiler? The opinion on page 81. of same report is an example of extreme length, unnecessary length. In *Mullally v. People*, 87 N. Y. 367, the noble animal, the dog, is thus eulogized: "When we call to mind the small spaniel that saved the life of William of Orange, and thus probably changed the current of modern history (2 Motley's *Dutch Republic*, 398), and the faithful St. Bernard, which, after a storm has swept over the crests and sides of the Alps, starts out in search of lost travellers, the claim that the nature of a dog is essentially base, and that he should be left a prey to every vagabond who chooses to steal him, will not now receive ready assent." We might go on and cite dozens more of instances of, it seems to us, unnecessary verbiage. Life is too short to prepare, now-a-days, a *perfect brief* of authorities, embracing every known case bearing on a question. Would it not be well to condense opinions? And as well, study to respect precedents? Of the great tendency now-a-days to neglect precedent we propose to speak in another article.

Solicitors' Incomes.—There has been some correspondence in the daily papers with reference to a supposed remark by a judge, that no solicitor should make more than £500 per annum profit. A correspondent of the *Times* says: "This is not reported of any living judge, but of a judge who died some years ago." He adds that "a solicitor has to work twelve months in the year, and very seldom makes more than £1500 a year absolute profit. That is the reason the salaries of the chief clerks and taxing masters, who must have been ten years in practice as solicitors, are fixed at £1500 a year. Yet before a solicitor makes £1500 he has to spend something like £3000. There are some solicitors who make as much as the Queen's Counsel, but they are few and far between, and they have to employ a large staff of clerks and enormous capital. In fact, they are speculators and capitalists, as well as

solicitors. They can command large round fees, not only because of their ability and soundness of advice, but also because of the powerful element they are often the means of combining in public undertakings. The idea of attempting to circumscribe the profits of such men is about as chimerical as the wonderful effects attributed to the philosopher's stone." "H. E. G." says: "When I was in London in 1856-7, for the usual year with the agents before admission as a solicitor, I remember going to see Sir Richard Bethell (he had already received a fee of 500 guineas on 'brief with papers'). An interlocutory motion had now to be made to the Court, for which an extra fee of 50 guineas was marked. It was amusing to see the astonishment of Sir Richard's clerk, raising his eyes and shrugging his shoulders, 'Sir Richard does not go into court for a less fee than 100 guineas.' The fee was altered to 25 guineas and given to the junior counsel, who was delighted to get it. Etiquette, it appeared, required us to go to the leader first, but the junior did equally well. Within a week I read in the *Times* that Sir Richard Bethell (from his place in Parliament) thought a solicitor's remuneration should not exceed £300 a year. I do not know if he had this particular solicitor in his eye, but I do know I was much impressed."

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF CAITHNESS.

Sheriff THOMS and Sheriff-Substitute SPITAL.

SMITH v. SUTHERLAND.

Practice—Court ordered Reclaiming Petition—What an obtempering of this order—Appeal dismissed because bona fide Petition not lodged.—On 5th October 1883, the Sheriff-Substitute gave decree in this action, with expenses, and on 19th October the defender appealed to the Sheriff. He, on 26th October, "having considered the defender's appeal and whole process, appoints the appellant to lodge a reclaiming petition within ten days after the date of this interlocutor, and the pursuer to lodge answers within ten days thereafter."

On 5th November the appellant lodged what he called a reclaiming petition, and on 14th November the pursuer lodged exhaustive argumentative answers.

The Sheriff has pronounced this interlocutor in the case:—

"Wick, 19th November 1883.—The Sheriff, in respect of the appellant's failure to lodge a reclaiming petition submitting the grounds either of fact or law on which he claims a reversal of the interlocutor against which he appeals, as ordered on 26th October last, Dismisses his appeal, and adheres to the interlocutor submitted to review, with additional expenses, as these may be taxed, and decerns.

GEO. H. THOMS.

Note.—It is not enough, where written argument is required by the Sheriff, to back up a sheet of paper and title it reclaiming petition, and tell the Sheriff to go to the evidence. Accordingly, the Sheriff has, in respect of the failure to obtemper his order, dismissed this appeal. He may add that the consideration he has given the case (without, however, the benefit of any argument for the appellant) leads him to concur with the Sheriff-Substitute on the merits. G. H. T."

Pursuer's agent—George M. Sutherland, solicitor, Wick; defender's agent—John M. Sutherland, solicitor, Wick.

SHERIFF COURT OF PERTH.

Sheriffs MACDONALD and BARCLAY.

BROWN AND LOGIE v. BUTTER.

Vituous Intromission.—This was an action against a son for a debt of his father, founded on vituous intromission in so far that he had taken possession of his father's shop and effects, with a croft and a cow thereon, the value of the cow being itself sufficient to meet the pursuer's debt. The defender denied vituous intromission. After proof, the following interlocutor was pronounced:—

Perth, 13th April 1883.—Having heard parties' procurators and made avizandum with process, proofs, and debate: Finds from the acts proved that the defender has become liable for the debts of his father by reason of vituous intromission with his father's effects, therefore decerns against the defender in terms of the prayer of the petition: Finds him liable to pursuer in expenses of process; allows an account thereof to be given in, and remits the same, when lodged, to the Auditor of Court to tax and to report, and decerns. HUGH BARCLAY.

Note.—There is no doubt but vituous intromission is subject in modern days to less rigid interpretation than in times gone by. But at no time was a fraudulent intention necessary to be proved, such as to sustain *criminal* charge if proved. Where the effects of the deceased are *trifling*, but are *still forthcoming*, and were merely taken into custody for a time, and not *disposed* of, there is good reason for avoiding the general liability incident to vituous intromission; and where funeral expenses are defrayed (which are always preferable), these must be allowed. In all cases there ought to be *reasonable precautions* taken to show what became of the effects. (1) Here the deceased appears to have been a shopkeeper, and to whose business the defender succeeded, and from the amount of pursuer's debts he appears to have done a fair business. (2) The deceased left furniture and shop utensils which were taken possession of by the defender and are still in his premises, without even an inventory taken thereof. (3) There was a cow in his father's possession, and which presumes property, and the ownership by the defender's son is not established. On the whole, there appear grounds for the law being allowed to take its course, although the case is certainly not very strong. The Sheriff-Substitute places no weight on the croft, which was laboured and sown by the defender, and the rent paid by him. H. B."

On an appeal, the Sheriff (J. H. A. Macdonald) pronounced the following interlocutor:—

“*Edinburgh, 14th September 1883.*—Having heard parties’ procurators on the foregoing appeal, recalls the interlocutor of the Sheriff-Substitute appealed against, assoilzies the defender from the conclusions of the action: Finds the said Mrs. Helen Cameron or Butter, as defender fore-said, entitled to the expenses of process; allows an account thereof to be given in, and remits the same, when lodged, to the Auditor of Court to tax and to report, and decerns.
J. H. A. MACDONALD.

“*Note.*—The Sheriff is satisfied on the proof that there is no *sufficient* ground for holding the defender responsible for vitious intromission. The estate was one of very *paltry value*, and the Sheriff holds it not proved that there was any stock or articles of value in the shop, and he is satisfied that the defender’s statements in regard to the cow are true.

“J. H. A. M.”

Act. Stewart—Alt. Mitchell.

SHERIFF COURT OF ZETLAND.

Sheriff THOMS and Sheriff-Substitute RAMPINI.

JOHN DALZIEL v. ELIZABETH MANSON.

Cessio—When appeal competent—Act of Sed. 1839 still in force, and if interim liberation sought, name of cautioner to be stated in petition and advertised—Imprisonment Act of 1882 (45 and 46 Vict. c. 42) does not alter nature of imprisonment.—These questions arose in this case, and were disposed of by the following interlocutors:—

“*Lerwick, 23rd October 1883.*—The Sheriff-Substitute having heard parties’ procurators, made avizandum, and resumed consideration of the foregoing petition: Grants warrant for *interim* liberation of the pursuer, John Dalziel, on condition of his finding sufficient caution to the satisfaction of the Sheriff-Clerk, by bond, for Twenty pounds sterling, to appear at all diets of this process, and also binding the cautioner to present the said John Dalziel at the prison of Lerwick for re-incarceration if this cessio be refused, or this interim warrant be recalled, which the incarcerating creditor shall be entitled to move the Court to do on sufficient grounds, and decerns.

“Signed October 24th, 1883.

CHARLES RAMPINI.

“*Note.*—This case raises for the first time, so far as the Sheriff-Substitute is aware, the important question—What is the nature of the imprisonment competent under the Civil Imprisonment (Scotland) Act of 1882? Is it penal or *quasi-penal* in its character, or is it merely a mode of enforcing a decree pronounced in a certain limited class of cases? If the former view is correct, the present application for *interim* liberation is incompetent; if the latter is the true interpretation of the statute, the debtor who has applied for cessio is entitled to be released on the usual terms. The Sheriff-Substitute has carefully considered the case of *Tevendale (Inspector of Poor of Fetteresso) v. Duncan (Scottish Law Reporter, vol. xx. p. 558)*, founded on by the imprisoning creditor, but he cannot see that it bears out his contention. The 9th section of the

Act almost *totidem verbis* and its whole tenor seem to show that the intention of the Legislature was not to alter the character of the imprisonment formerly competent under certain conditions for all debts, but to limit its application to a certain class of debt—the failure to pay which was apparently regarded as a more serious delinquency than the failure to satisfy ordinary merchants' or shopkeepers' accounts.

“That the pursuer is little entitled to the consideration of the Court, is a fact which cannot alter the Sheriff-Substitute's decision with regard to the present application. C. R.”

“*Lerwick, 24th October 1883.*—The defender craves the leave of the Sheriff-Substitute to appeal the foregoing interlocutor to the Sheriff.

“ALEX. MACGREGOR,

“*Solicitor, Lerwick, Agent for Defender.*”

“To obviate any doubt as to the necessity for asking leave to appeal, the Sheriff-Substitute hereby grants leave as craved.

“CHARLES RAMPINI.

“*Lerwick, 24th October 1883.*”

“*Lerwick, 25th October 1883.*—The defender appeals to the Sheriff.

“ALEX. MACGREGOR,

“*Solicitor, Lerwick, Agent for Defender.*”

“The parties concur in moving the Sheriff to dispose of this appeal without reclaiming petition and answers or hearing.

“ALEX. MACGREGOR, *for Defender.*

“J. KIRKLAND GALLOWAY, *for Petitioner.*”

“The Sheriff having considered the appeal of the incarcerating creditor and whole process, sustains said appeal: Recals all the interlocutors pronounced, with expenses against the petitioner as these shall be taxed: And on payment to the incarcerating creditor or her agent of such taxed expenses, allows the petitioner to lodge a minute of amendment of this petition so as to make it conform to the provisions of section 11 of the Act of Sederunt of 1839. GEO. H. THOMS.

“*Lerwick, 5th November 1883.*”

“*Note.*—The competency of an appeal such as this, with but not without the leave of the Sheriff-Substitute, would seem to be settled by the Sheriff of Stirling's decision in *Neil v. His Creditors*, 9 Sept. 1878, *Guthrie's Select Cases*, App. No. 1.

“But the Sheriff is of opinion that this petition requires to be amended, so as to be brought into conformity with the Act of Sederunt of 1839, which is in *irridi observantia* as regards this matter. *Williamson v. M'Lachlan*, 19 July 1866, 4 Macp. 1091, 38 S. Jurist 568.

“The Sheriff so decided in the Zetland case, *Harrison v. Jamieson*, 8 Sept. 1877, 21 *Journal of Jurisprudence*, p. 580, and the Caithness case of *Sutherland*, 7 Jan. 1878, unreported. In the former he issued this note:—‘Although this petition craves liberation from prison, the petitioner has not set forth the amount of caution, and the name of the cautioner or cautioners offered by him, in terms of section 11 of the Act of Sederunt of 6th June 1839. By section 4 of that Act of Sederunt, it is further provided that when the petitioner prays for liberation, that prayer shall be specially intimated by the notice in the *Gazette*, and by

the letters sent to the creditors. As regards both sections, these provisions have been disregarded by the petitioner. It is supposed that he considers that, being inconsistent with the provisions of section 26 of the Sheriff Court Act of 1876, sub-sec. 3, the above-mentioned sections of the Act of Sederunt have been, by implication, repealed. The Sheriff cannot concur in this view. In fact, the observance of these provisions seems all the more necessary now that *interim* liberation can, as in this case, be obtained after forty-eight hours' notice to the incarcerating creditor or his agent, and on caution 'to present the applicant at the prison for re-incarceration should the cessio be refused, or the *interim* warrant recalled.' These last words must be taken in connection with the provisions in the succeeding sub-section (4), that 'warrants of *interim* protection or *interim* liberation shall remain good till recalled.' The object evidently was to preserve to creditors, other than the incarcerating one, the right to attempt to get recal of *interim* liberation if they have good grounds for doing so. And to remove all doubts as to the notices to creditors, with this among other objects being unaltered, it is further specially enacted in the next sub-sec. (5), 'Any notices or intimation required by law to be given to creditors shall be sufficiently given in the case of creditors furth of Scotland, if given to their known agents or mandatories in Scotland.'

"If these views be correct, and the Sheriff has seen no reason to change them, the Sheriff-Substitute's interlocutor of 23rd October, now recalled, was wrong in limiting recal to the incarcerating creditor. The other creditors were quite entitled to make such a motion, and the bond of caution required should protect them as well as the incarcerating creditor.

"With reference to the Sheriff-Substitute's views as to the character of imprisonment being unchanged by the late Act (45 and 46 Vict. c. 42), the Sheriff expresses his concurrence in them. The theory of the Scotch law of imprisonment is, that it is for contempt and disobedience of the Queen's command to pay the debt for which her judge has given decree, and that is unchanged. In fact, section 4, sub-section 6 of the late Act, confirms this, by declaring that prisoners are to be treated as 'committed for contempt of Court.'

"But this being so, it is all the more necessary to adhere to the old practice as regards cessios prosecuted by the fathers of illegitimate children. The case of *A. B. v. His Creditors*, 11 October 1865, *Guthrie's Select Cases*, p. 159, may be usefully referred to. Its rubric is: 'The benefit of cessio ought to be refused where the principal debts are the aliment of an illegitimate child and the expenses incurred in defending the action of filiation.' *Interim* liberation was there also refused. The last paragraph of the Sheriff-Substitute's note in the present case shows that now that he may have to reconsider the matter of *interim* liberation, he may, in the light of the above decision, come to a different conclusion as to granting it.

G. H. T."

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